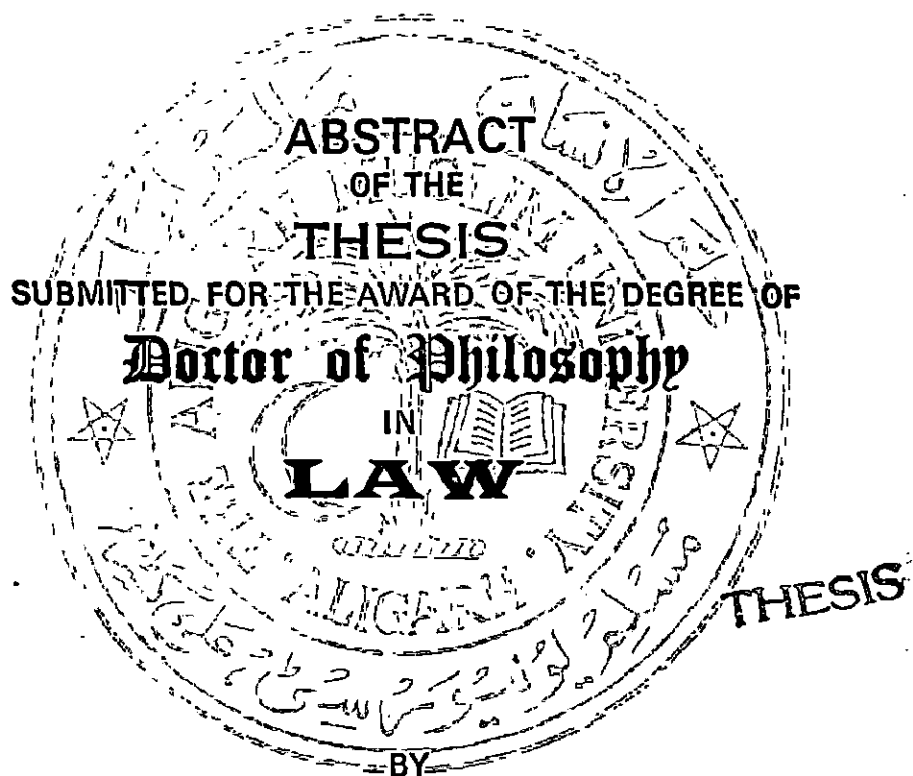




RELEVANCE OF MAHR IN CONTEMPORARY SOCIETY: A SOCIO-LEGAL STUDY

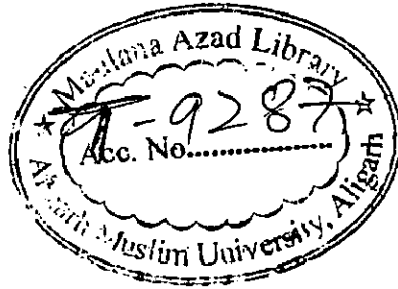


HASHMAT ALI KHAN
Assistant Professor

DEPARTMENT OF LAW
ALIGARH MUSLIM UNIVERSITY
ALIGARH-202002 (INDIA)

2014

THESIS



ABSTRACT

THESIS

ABSTRACT

In the present world, everybody is talking about the economic empowerment of the women to ameliorate their social status. Some efforts (like reservation in Govt. jobs) have been made in this direction but this is not enough. Islam has from its very inception provided an inbuilt mechanism in its social system. The provision of Mahr (if regulated in its letter and spirits) in marriage is an important means not only to check the unbridled menace of divorce but also to empower the women in its economic conditions.

After the advent of Islam, the Institution of dower occupied very important place in the Muslim Law. The incident of dower became an integral part of the institution of marriage in Islam. Under the Islamic society dower is highly institutionalized part of Muslim Marriages and is thought of as a form of insurance for the bride in case of separation and divorce. The concept of dower has changed from time to time according to the changing socio-economic status of woman. Firstly, in pre-Islamic society it was considered as a sale price of the woman and paid to the parents. Woman had no right over it. Secondly, after the advent of Islam, dower is considered as personal property of the woman. Thirdly, in modern society it is considered as a social and

economic security of the women and delinks ages with the incident of divorce.

The concept of dower is not the only innovation of Islamic law as it was also found in the Pre-Islamic Arab Society. But it was not in its present form as it is found in the present Islamic law. This was so because of the various ways of adopting wife and the poor position of woman in the days of ignorance. The women were deprived of their various rights for which they were entitled as a human being. Among the rights, which were not enjoyed by them, was right to get dower from their husbands. As among the primitive people, different methods of securing wives were prevalent.

With the advent of Islam, the practices which were prevalent in the days of ignorance to deprive the women's from their rights of dower were removed by Islam. It was made necessary to pay dower to the woman. Quran declares:

"And give the woman (on marriage) their dower, as a free gift, but if they off, their own goods pleasure, remit any part of it, take it and enjoy it with right good cheer". (An-Nisā' 4:4)

There were also traditions on this point by which it becomes clear that *Mahr* was made necessary for every marriage. According to a

tradition in Bukhari "the *Mahr* is an essential condition for the legality of marriage".

Thus, in this way *Mahr* was made essential for every marriage under Islam to safeguard the right of dower of the married women. The amount of dower is not material. Even a small portion of money may be fixed as *Mahr* and can be given by the husband to his wife. Once Prophet Mohammad (P.B.U.H.) allowed a marriage with only a pair of shoes as *Mahr* and approved of a poor man who did not possess even an iron ring, giving his wife instruction in Quran as *Mahr*. According to Fyzee the object of dower is twofold.

1. To impose an obligation on the husband as a mark of respect of the wife and
2. To place a check on the capricious use of divorce on the part of husband.

Another object of dower is to provide a woman her subsistence after her marriage or divorce.

According to *Fatawa-i-Qazi Khan*, *Mahr* is so important for the solemnization of marriage that if it was not mentioned at the time of the marriage or in the marriage contract, the law will presume it by virtue of the contract itself. It is so essential incident of marriage under Islamic law that even if there is a stipulation on the part of the women before

marriage to forego all her rights to dower or even if she agrees to marry without any dower; the stipulation or agreement will be invalid.

The reason of its importance lies in the protection that it imparts to the wife against the arbitrary exercise of the power of divorce by the husband. Under Islamic law, the husband can divorce his wife at his whim so the subject matter of dower is to check upon absolute power of the husband to terminate the marriage at any time without any cogent reason. It not only protects from his unbridled power to divorce but also from his extravagance in having more than one wife. A stipulation to charge a huge dower on the occasion of his another marriage is enough to deter him from enjoying the option of having more than one wife at a time. In *Abdul Kadir Vs. Salima*, Mahmood J. has observed the marriage contract is easily dissoluble and the freedom of divorce and the rule of polygamy place the power in the hands of the husband which the law giver intended to restrain by rendering the rules as to payment of dower stringent on the husband. That is why the right of the wife to her dower is a fundamental feature of marriage contract.

1. Objectives of the Study

The objective to undertake this research work is pertaining to:

- (1) Evaluate the position and concept of dower before Islam and the reforms that were made in this sphere by Prophet (P.B.U.H.) after the advent of Islam.

- (2) Study the true nature of *Mahr* and the efforts of the Whether jurists of Muslim law and the judiciary to explore the real meaning, nature and concept it.
- (3) The nexus of *Mahr* with the institution of marriage and the impact on the validity of marriage if mahr is not settled at the time of marriage.
- (4) Study the present state of affairs as regards to its enforcement and workability in the existing socio-economic conditions of women in India.
- (5) The remedies that is available to the wife for non-payment of dower at the time of marriage or after dissolution of marriage?
- (6) The codification of laws regarding *Mahr* that has taken place in the sub-continent and elsewhere in the world.
- (7) The impact of dower as an effective means to ensure economic safeguard to the women in present society.
- (8) The present trend of fixing the dower as prompt or deferred and its realisation by the woman from the husband.

2. Hypothesis

The research proceeds on the following hypothesis:

Most of the Muslim women are not aware about the actual effect of their rights to get mahr from their husbands. This right may prove a means for stabilizing the marital relations.

The right of the wife to get mahr can play a very crucial important role in the economic empowerment of the female if dower is fixed according to the socio and economic status of the parties.

The amount of dower and a fair provisions relating to maintenance if awarded together by the Court at the time of divorce, she would be able to receive handsome amount of money from her husband that can be utilized by her in more effective manner to lead a dignified life as compare to seeking maintenance from her husband monthly under section 125 of the Cr.P.C.

3. Impact of the Study

Muslim Community will become aware about the importance of *Mahr* in the contemporary society and will be able to utilize such concept in more effective manner within the spirit of Quran and Hadith for their betterment. This study would add something to the existing pool of literature in the society pertaining to the subject.

4. Methodology

The methodology adopted is doctrinal and analytical. This study is basically based on fundamental sources of Islamic law i.e. The Quran, Hadith and the juristic works in English, Urdu and Arabic languages. Secondary materials consists relevant Journals, books, reports and articles published and used for assessing the present legislative and judicial trends in India and Muslim countries. Leading decisions on the subject by Privy Council, Supreme Court of India, High Court of States

and even decisions of Districts courts of Aligarh and Agra have also been analyzed to examine, identify and spell out the misconceptions and inconsistencies that have crept into the working and usefulness of the institution of *Mahr*. Use of Internet was also made together important information related to the subject of study.

5. **Chapter wise Introduction:** I have divided my thesis in VI Chapters. The brief chapter-wise contents are as under:

Chapter I has been devoted to the study of the origin and development of the law on *Mahr* with reference to the *Quranic* directions, practices of the prophet (P.B.U.H.) and the later developments.

Chapter II is the study of concept, meaning and nature of *Mahr* and the real object of *Mahr* in Islam.

Chapter III deals with the relevance of *Mahr* with the institution of marriage and what will be the effect on the validity of marriage. If not fixed at the time of Marriage and also deals with the subject matter of *Mahr* and its quantum in the light of Hadith and common usages and practices. Impact of modern litigations on the amount of *Mahr* has also been considered herein.

Chapter IV In Chapter IV of thesis it is discussed that what are different kinds of *Mahr* and how they can be realized by the wife from her husband.

Chapter V is an endeavour to determine the extent of entitlement of Muslim women to *Mahr* in cases of extra judicial as well as judicial divorces. Chapter also incorporates the principles of Islamic law and a detailed account of judicial precedents about the nature and scope of the widowed woman claim to *Mahr* especially the "widow's right of retention".

Chapter VI gives a review of the statutory laws related to *Mahr* in different Muslim country with reference to the relevant classical law.

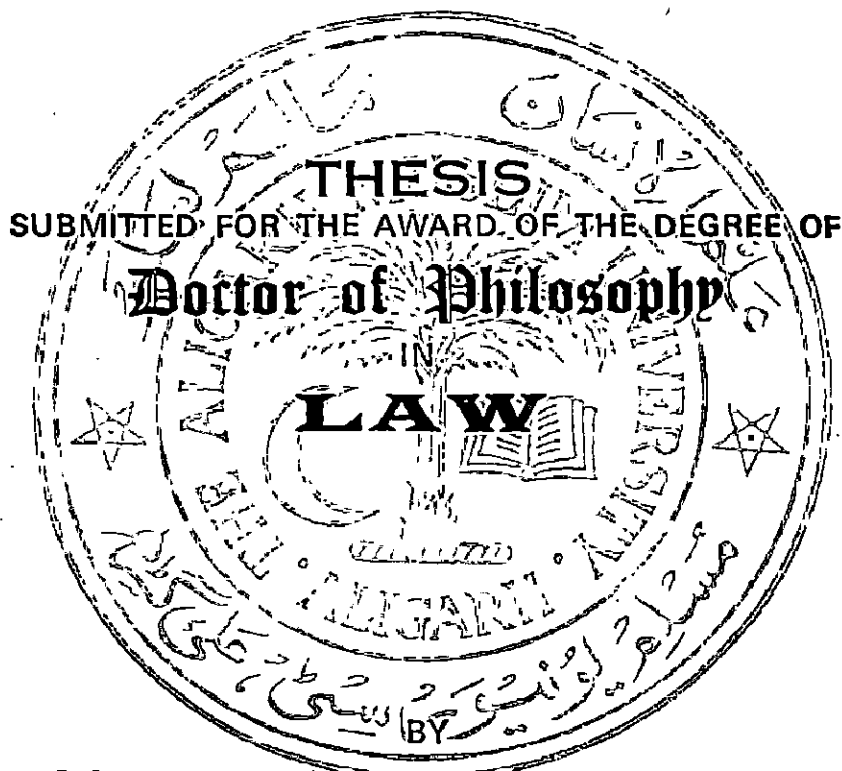
In the concluding chapter, the impressions from the various findings in this study have been stated and some suggestions have accordingly been articulated to make the institution of *Mahr* useful for Muslim society in general and the Muslim women in particular.

Conclusion and Suggestions:

Please peruse the chapter in the thesis.



RELEVANCE OF MAHR IN CONTEMPORARY SOCIETY: A SOCIO-LEGAL STUDY



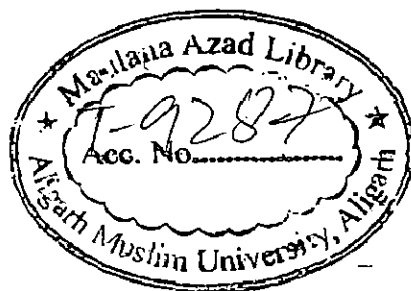
THESIS

HASHMAT ALI KHAN
Assistant Professor

DEPARTMENT OF LAW
ALIGARH MUSLIM UNIVERSITY
ALIGARH-202002 (INDIA)

2014

THESIS



31 JAN 2015



T9287

Dedicated

To my

Parents & Wife

THESIS

CONTENTS

	Page
ACKNOWLEDGMENT	i - ii
ABBREVIATION	iii
TABLE OF CASES	iv-viii
INTRODUCTION	1 - 11
AN OVERVIEW	
• Objectives of the Study	
• Hypothesis	
• Impact of the Study	
• Methodology	
• Chapter wise Introduction	
CHAPTER-I	12 - 38
HISTORICAL RETROSPECT	
• Dower: Pre-Islamic Society	
• Dower: Islamic Society	
• The Relevant Ahadith on <i>Mahr</i>	
• <i>MAHR</i> : Outside India:	
• 5. Position of <i>Mahr</i> in India	
CHAPTER-II	39 - 80
DOWER: A CONCEPTUAL ANALYSIS	
• Dower: Secular Understanding Meaning and Nature	
• Nature of <i>mahr</i> as an Islamic Legal Concept	
• Socio-Legal Significance of <i>mahr</i> in the Islamic Society	
• Some pre and non-Islamic concepts confused with <i>Mahr</i>	
CHAPTER-III	81 - 169
MARRIAGE AND INSTITUTION OF DOWER	
• General Observation	
• Instruction in religion	
• Legislation in Muslim Countries	
• Indian Legislation	
• Dissolution of Muslim Marriage Act 1939	
• Procedural Laws	
• Case Law in the Subcontinent	
• Impact of the Muslim Marriages Registration Act, 1980	
• <i>MAHR</i> AND <i>AQD AL-NIKAH</i> : A LEGAL NORMS	
• Validity of Marriage without fixing dower	
• Dower- a religious ordinance	
CHAPTER-IV	170 - 252
DIFFERENT KINDS OF DOWER AND THEIR REALIZATION	
• Specified Dower	
• Prompt dower and its Payment	
• Deferred Dower and its Payment	
• Proper Dower (<i>Mahr-e-misl</i>)	
• Determination of proper dower	

	<ul style="list-style-type: none"> • Difference between Prompt and Deferred Dower • Remedies on non-payment of Dower • Decree in a suit for Dower • Discretion of remission of Mahr by wife • Payment of Mahr on death of either party 	
CHAPTER-V	MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE	253 - 343
	<ul style="list-style-type: none"> • The Approach of Shariah law on Mahr and Dissolution of Muslim Marriage • Dissolution of Muslim marriage Act, 1939 • Mahr, Nafaqah & Mata': Nature and Inter-Relationship • Muslim Widow's Right to retain possession of husband's estate in lieu of dower • Salient Features for right of retention 	
CHAPTER-VI	STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES	344 - 388
	<ul style="list-style-type: none"> • Statutory Provisions relating to <i>Mahr</i>: • Definition of <i>Mahr</i> • Nature of the Right to <i>Mahr</i>: • Subject matter of <i>mahr</i> • Quantum of <i>Mahr</i> • Specified and 'Proper' <i>mahr</i> • Bride's consent to <i>mahr</i> • Disputes about <i>mahr</i> amount • Increase or decrease in the amount of <i>mahr</i> • Time for payment of <i>mahr</i> • Enforcement of <i>mahr</i>: • <i>Mahr</i> and irregular (<i>fasid</i>) marriages • <i>Mahr</i> and marriage consummation • <i>Mahr</i> as damages for breach of betrothal • Return of <i>mahr</i> • <i>Mahr</i> and equality of spouses (<i>Kufu</i>) • <i>Mahr</i> and <i>Khula'</i> • <i>Mahr</i> and <i>Faskh</i> • Procedure for payment of <i>mahr</i> • <i>Mahr</i> and anti-dowry legislations 	
CONCLUSION & SUGGESTIONS		389 - 406
BIBLIOGRAPHY		407 - 412
APPENDIX - I		i - iii
APPENDIX - II		iv - vii
APPENDIX -III		viii - xii

ACKNOWLEDGEMENT

ACKNOWLEDGEMENT

In the name of Almighty Allah the most beneficent and merciful who blessed me to embark upon this task and successfully complete it.

I have been immensely benefited by the valuable suggestions and advice of Prof. Iqbal Ali Khan, Dean, Faculty of Law, AMU, Aligarh. From his rich fund of knowledge and immaculate conceptual clarity, he regularly rendered brief, precise and to the point comments and valuable suggestions. I would forever owe an intellectual debt to him.

It is also a pleasant duty of mine to acknowledge my debt of gratitude to Prof. Saleem Akhtar, Chairman, Department of Law and Prof. Ishaque Qureshi (Ex-Dean & Chairman) for their inspiring attitude and encouragement.

I am also indebted to my colleagues, Dr. Zubair A. Khan, Dr. Javed Talib, Dr. Mohd. Ashraf, Dr. Zaheeruddin, Dr. Z.M. Nomani, Dr. Shakeel Ahmad, Dr. Shakeel Samdani, Dr. Waseem Ali, Dr. Nafees Ahmad, Dr. Kaleemullah, Dr. Ragib, Dr. Rahmatullah for their valuable co-operation and inspiration during the course of this study.

To my mother, to her love, care and guidance, I owe a debt which I would never be able to pay back.

I acknowledge my debt of gratitude to all known and unknown scholars, thinkers, writers, jurists and judges from India and other countries whose views and comments added to my knowledge.

ACKNOWLEDGEMENT

I express my deep sense of gratitude to my wife Dr. Arifa Khan, for her co-operation which has always remained with me.

I must record with great appreciation the cooperation extended to me by my elder brothers Rao Azmat Ali Khan and Rao Nifasat Ali Khan and my children Nayla Khan, Usaid Ali Khan and Ayesha Khan.

Last but not the least my special thanks to Qadir Bhai for typing out this research work with precision and devotion.


(Hashmat Ali Khan)

ABBREVIATION

ABBREVIATIONS

A.I.R.	All India Reporter
A.S.I.L.	Annual Survey of Indian Law
All. L.J.	Allahabad Law Journal
Bom.	Bombay
C.P.C.	Civil Procedure Code
Cal.	Calcutta
Cal. W.N.	Calcutta Weekly Notes
D.B.	Division Bench
H.C.	High Court
I.A.	Indian Appeals
I.C.	Indian Cases
I.L.R.	Indian Law Reports
I.C.L.Q.	Islamic and Comparative Law Quarterly
I.C.L.R.	Islamic and Comparative Law Review
IR	Indian Rupees
J&K L.R.	Jammu & Kashmir Law Reporter
J.I.L.I.	Journal of the Indian Law Institute
Lah.	Lahore
M.I.A.	Moore's Indian Appeals
Mad.	Madras
P.C.	Privy Council
P.L.D.	Pakistan Legal Decisions
Pat.	Patna
Q.B.	Queen's Bench
R.A.	Radiyallahu Anhu, Rahmatullahi Alaih
S.A.W.	Sallallahu Alihi Wasallam
S.C.C.	Supreme Court Cases
S.C.R.	Supreme Court Reporter
Smv.	Samvat era
So. Sh.	Somalian Shilling
T.P. Act	Transfer of Property Act
P.B.U.H.	Peace and Blessing Upon Him

TABLE OF CASES

THESIS

TABLE OF CASES

Abdul Kadir	Vs.	Salima, 6, 61, 158, 172, 209
Abdul Rahman	Vs.	Wali Mohammad, 303
Abdul Rehman Khan	Vs.	Mst. Inayati Bibi, 129, 216, 215
Abdul Sattar	Vs.	Mt. Aqida Bibi, 179
Abdul Wahab	Vs.	Mushtaq Ahmad, 318
Ahmad Hussain	Vs.	Kallu Mian, 7
Ahmad Hussain	Vs.	Mt. Khadeja, 154, 178
Ahmad Khan	Vs.	Noorjahan, 180, 181
Ali Bukhsh	Vs.	Kaeem Bibi, 277
Ali Muhammad Khan	Vs.	Azizullah Khan, 329
Ameer Ahmad	Vs.	Sankara Narajana Chatty, 329
Amin Begum	Vs.	Soman, 188
Amina Bibi	Vs.	Mt. Ibrahim, 149, 157
Amir Hassan	Vs.	M. Nazir, 322
Amurom Nisfa	Vs.	Moored-un-Nisfa, 212
Anis Begum	Vs.	Mohammad Istafa, 62, 160, 176
Arab Ahmad Bin Abdullah	Vs.	A.B. Mohamuna Saiydabhai, 289
Asma Bibi	Vs.	Abdul Samad Khan, 134
Asma Bibi	Vs.	Sarnad Khan, 110
Azizullah Khan	Vs.	Ahmad Ali Khan, 317
Bai Tahira	Vs.	Ali Hussain, 284, 289
Baij Nath	Vs.	Hajee Vally Mohammad, 143
Balqis Fatima	Vs.	Naiam-ul-Ikram Qreshi, 35
Bashir Ali	Vs.	Hafiz Ali, 97
Bibi Makbulunnissa	Vs.	Bibi Umatunnissa, 303
Bibi	Vs.	Musi bibi, 314
Buland Khan	Vs.	Janee, 219
Collector of Moradabad	Vs.	Harbans Singh, 139
E.M. Ebrahim	Vs.	Mama & others, 192
Eidamn	Vs.	Mazhar, 210
Ekram Hussain	Vs.	Ali Hussain, 143
Fatima	Vs.	Sadraddin, 132
Fazal Begum	Vs.	Hakim Ali, 282
Fuziunbi	Vs.	Khader Vali, 284

TABLE OF CASES

Ghani Ahmad	Vs.	Medhi Begum, 90
Ghiasuddin Babu Khan	Vs.	C.I.T. A.P., 187, 323
Ghouseyar Khan & Others	Vs.	Fatima Begum, 299
Ghulam Ali	Vs.	Saghirunnisa, 218
Goover	Vs.	Hayatbhai, 300, 312
Haji Faqir Bux	Vs.	Pandit Thakur Prasad, 182
Haji Mokshed Mondal	Vs.	Del Rouson Bibi, 153, 297
Haliman	Vs.	Md. Mamir, 317
Haliman	Vs.	Mohd. Mamir, 293
Hamidunnessa Bibi	Vs.	Zohiruddin Sheikh, 208
Humaira Bibi	Vs.	Zubaida Bibi, 62, 84, 172, 192, 211, 324
Hasan Bukhari	Vs.	Madam Chetty, 325
Hasnumiyan	Vs.	Halimunnissa, 320
Hira Singh	Vs.	Mosaheb, 315
Hosseinooddeen Chowdhary	Vs.	Tajehwisk Khatoon, 217
Hussain Khan	Vs.	Gulab Khatoon, 175, 215
Imambi	Vs.	Khaja Hussain, 213, 298
Imperial Bank of India	Vs.	Bivi Sayedan, 247
Jahangir Khan	Vs.	Abdur Rehman, 195
Janudul Haq	Vs.	Zubair Haider, 299
Kamarunnissa	Vs.	Hussaini Bibi, 149
Kapurchand	Vs.	Kadarun Nissa, 159
Karam	Vs.	Joharbi, 7, 182
Katimunnissa	Vs.	U. Marakar, 198
Khadija Begum	Vs.	Nisar Ahmed, 315
Khadija	Vs.	M. Zahir, 149
Khairum Nisa	Vs.	Mohd. Husain Bara, 199
Khajuannissa	Vs.	Saifullah Khan, 217
Khatoon Begum	Vs.	Hosseinee Baksh, 219
Khurshid Bibi	Vs.	Muhammad Amin, 36
Kulsumbi	Vs.	Bilan Khan, 143, 215, 299
Latafat Hussain	Vs.	Hidayat Hussain, 334
M. Iman Din	Vs.	Hasan Bibi, 189
M. Talib Hussain	Vs.	Inayati Jan, 149

TABLE OF CASES

Mahadeo	Vs.	Mt. Bibi Maniran, 180, 205
Mahar Ali	Vs.	Amani, 195
Mahommad Ishaq	Vs.	Sheikh Ikram ul Haq, 275
Maina Bibi	Vs.	Chaudri Vakil Ahmad, 314
Malik Iftikhar Wali	Vs.	Sarwari Begum, 338
Mangal Rai	Vs.	Hira Lal, 197
Mangat Rai	Vs.	Sakina Begum, 188, 206
Manihar Bibi	Vs.	Rakha Singh, 183
Manihar Bibi	Vs.	Rakha Singh, 198
Manihar	Vs.	Rakha Singh, 205
Marina	Vs.	Nuruddin, 202
Mashal Singh	Vs.	Ahmad Husain, 313
Md. Nayeem Khan	Vs.	Union of India, 331
Meer Mahr Ally	Vs.	Mst. Amina, 207
Mirza Ali	Vs.	Qadri Khanam, 194
Mirza Badar Bukht	Vs.	Mirza Khuram Bukht, 181, 185
Mirza Sulleman Kadar	Vs.	Nawab Mehdi Begum, 100
Mohd. Janudul Haque	Vs.	Mohd. Zubair Haider, 212
Mohd. Sahif	Vs.	Zaib Jahan, 302
Mohd. Shahabuddin	Vs.	Mt. Ummatur Rasul, 97, 144, 112
Mohd. Taqi Ahmad	Vs.	Farmoodi Begum, 7, 176, 182, 183, 296
Mst. Manihar Bibi	Vs.	Rakha Singh, 297
Mst. Amtul Rasool	Vs.	Karim Baksh, 133, 182, 183, 207
Mt. Fatima Bibi	Vs.	Lall Din, 63, 86
Mt. Nasra Begum	Vs.	Rizwan Ali, 5, 62, 179
(Mt.) Imtiyaz Begum	Vs.	Abdul Karim, 317
(Mt.) Umar Din	Vs.	Muhammad Din, 279
Mubarak-un-Nisa	Vs.	Mansab Hasan Khan, 150, 279
Muhammad Ahmad Khan	Vs.	Shah Bano Begum, 2, 284
Muhammad Taqi Khan	Vs.	Farmoodi, 133, 157, 216
Muhammad Yaqub Hussain	Vs.	Inayati Jan, 278
Mulka Do Alam Nawab Tajdar Bahoo	Vs.	Mirza Jehan Kadr, 100
Masthan Saheb	Vs.	Assam Bibi, 184
Najmunnisa Begum	Vs.	Sirajuddin Ahmad, 321

TABLE OF CASES

Nasarat Hussain	Vs.	Hanidan, 339
Nasiruddin Shah	Vs.	Amatul Mughani, 187
Naurozi	Vs.	M. Nur Khan, 130
Nawab Begum	Vs.	Allah Rakha, 139, 177, 187, 196, 205
Nemi Chand	Vs.	Mt. Muluk Begum, 196
Nujmoodeen Ahmad	Vs.	Beebee Hossein, 140, 202
Nur-ud-din Ahmad	Vs.	Masuda Khanum, 174
Nurunnisa	Vs.	Khawja Mohammad, 319
P.S. Narayana Ayyar	Vs.	Biyar Bibi, 303
Pukhraj Begum	Vs.	Hidayat Ali, 178
Pym.	Vs.	Campbell, 142
Qasim Husain	Vs.	Bibi Kaniz Fatima, 315, 320
Rabia Khatoon	Vs.	Mukhtar Ahmad, 209
Rajeev	Vs.	Ramkishan Jaiswal, 5
Rameshwar Nath	Vs.	Aftab Begum, 297
Rani Khajoonsunnisa	Vs.	Rani Ryessunisa, 175
Raza Hussain	Vs.	Ifatoonnisa, 335
Razia Bano	Vs.	Nawab Ara Begum, 202
Razina Khatoon	Vs.	Abida Khatoon, 303
Rehana Khatun	Vs.	Iqtidaruddin, 178, 183, 205
Rukaiya Begum	Vs.	Radha Kishan, 148
Rustam Ali	Vs.	Abdul Jabbar, 304
S.K. Mohammad Zubair	Vs.	Mt. Bibi Sahida, 90
Sabir Hussain	Vs.	Farzand Hussain, 181
Saburanessa	Vs.	Sabdu Sheikh, 62
Saibanbi	Vs.	Mahmood Ali, 322
Saima Aziz	Vs.	Muslim Khan, 250
Sajjad Hussain	Vs.	Mohd. S. Hasan, 315
Salma Begum	Vs.	Azmat Ali, 250
Sarb Krishna	Vs.	Mst. Fatima, 177, 188, 205, 302
Sardar Mohd.	Vs.	Maryam Bibi, 192
Sarwar Ali Khan	Vs.	Jawahar Devi, 190
Shahnaz	Vs.	Rizwan, 62
Shaikh Abdul Rashid	Vs.	Qudrabiunnisa, 219

TABLE OF CASES

Shaikh Abdul Shukoor	Vs.	Raheemoon-Nissa, 210
Shaikh Salma	Vs.	Abdul Kadar, 303, 327
Sheikh M. Zubair	Vs.	Mst. Bibi Sahida, 88, 301
Sheikh Muhammad	Vs.	Aisha Bibi, 183
Siddique	Vs.	Family Judge Court III, 62
Sugra Bibi	Vs.	Gaya Prasad, 188, 193
Sugra Bibi	Vs.	Masuma Bibi, 99, 135
Sulaiman Kadr	Vs.	Mehdi Begum, 129
Sultan Begum	Vs.	Siraj-ud-Din Ahmad, 140
Sultan Nachi	Vs.	Salawar Bi, 214
Syaiyad Qasim	Vs.	Habibur Rahman, 214
Syed Humaira	Vs.	Syed Imran Agha, 250
Syed Mohd. Haider	Vs.	Safdar Shah, 297
Syed Sabir Hussain	Vs.	S. Farzand Haan, 159, 211
Umrao Bibi	Vs.	Ahmed Baksh, 156
Wahedunnissa	Vs.	Shubratun, 331
Wajeeh-un-nissa	Vs.	Mirza Hasan Ali, 99
Wajid Ali Khan	Vs.	Shaukat Ali Khan, 177
Wilyat Hussain	Vs.	Allah Rakhi, 122
Zabardast Khan	Vs.	His Wife, 189
Zahoor Ahmad	Vs.	J.P. Singh, 215, 314
Zaibunnisa	Vs.	Nazim Hasan, 318
Zakeri Begum	Vs.	Muhammad, 38
Zakeri Begum	Vs.	Sakina Begum, 130, 141
Zamin Ali	Vs.	Azizunnissa, 219, 324
Zamir Hussain Khan	Vs.	Tassaduq Ali Khan, 297
Zarina Quisha	Vs.	Arab Wali Mohd., 62

INTRODUCTION

AN OVERVIEW

- Objectives of the Study
- Hypothesis
- Impact of the Study
- Methodology
- Chapter wise Introduction

INTRODUCTION

A. AN OVERVIEW

In pre-Islamic Arabia, the institution of marriage as we know it nowadays was not so developed. Many forms of sex relationships between men and women were commonly in vogue. Some were temporary and hardly better than prostitution. Men, after dispelling their wives, often turned them out helpless and without any means. The ancient custom to settle certain sums for the subsistence of the wife in the event, she was turned out was often disregarded as there was no organized system of law.

But after the advent of Islam, the Institution of dower occupied very important place in the Muslim Law. The incident of dower became an integral part of the institution of marriage in Islam. Under the Islamic society dower is highly institutionalized part of Muslim Marriages and is thought of as a form of insurance for the bride in case of separation and divorce.¹ The concept of dower has changed from time to time according to the changing socio-economic status of woman. Firstly, in pre-Islamic society it was considered as a sale price of the woman and paid to the parents. Woman had no right over it. Secondly, after the advent of Islam, dower is considered as personal property of the woman. Thirdly, in modern society it is considered as a social and

1. Saleem Akhtar: Maintenance of Muslim divorcees, 9 J. of Bar Council of India, 92 (1982)

INTRODUCTION

economic security of the women and delinks ages with the incident of divorce.²

The concept of dower is not the only innovation of Islamic law as it was also found in the Pre-Islamic Arab Society. But it was not in its present form as it is found in the present Islamic law. This was so because of the various ways of adopting wife and the poor position of woman in the days of ignorance. The women were deprived of their various rights for which they were entitled as a human being. Among the rights which were not enjoyed by them, was right to get dower from their husbands. As among the primitive people, different methods of securing wives were prevalent.³

The most common method was marriage by purchase. The husband was required to pay the price of the bride to her father, brother or other relative, who so ever may be the guardian of the girl. And in the case of marriage by service the husband served the father of the bride with his service. And in consideration of their services the father of the girl used to give his daughter to his would be son in law. Marriage by capture was also found at that time. These were the devices by which women were deprived of their rights of dower.

2. *Mohd. Ahmad Khan v. Shah Bano* AIR (1985) S.C. 945.

3. Willystin Goodsell: A history of Marriage and Family, 23 (1947).

INTRODUCTION

Sir Abdur Rahim⁴ "says that in the regular form of marriage the fixing of *Mahr* or dower for the benefit of the wife was in vague form among the Pre-Islamic Arab Society. It formed part of the marriage but in some cases the guardian of the girls were used to take dower himself. But at the time of Prophet Mohammad (P.B.U.H.) dower was regarded as a principal term of marriage contract. Its payment in the event of divorce or death of the husband was enforced by the voice of the public opinion or by the power of the woman's relative unless it has been paid at the time of marriage."

With the advent of Islam, the practices which were prevalent in the days of ignorance to deprive the women's from their rights of dower were removed by Islam. It was made necessary to pay dower to the woman. Quran declares:

"And give the woman (on marriage) their dower, as a free gift, but if they off, their own goods pleasure, remit any part of it, take it and enjoy it with right good cheer".

There were also traditions on this point by which it becomes clear that *Mahr* was made necessary for every marriage. According to a tradition in Bukhari "the *Mahr* is an essential condition for the legality of marriage".⁵

4. Abdur Rahim: Mohammadan Jurisprudence, 8 (1958).

5. E.J. Brill's: First Encyclopedia of Islam 137 (1937).

INTRODUCTION

Thus, in this way *Mahr* was made essential for every marriage under Islam to safeguard the right of dower of the married women. The amount of dower is not material. Even a small portion of money may be fixed as *Mahr* and can be given by the husband to his wife. Once Prophet Mohammad (P.B.U.H.) allowed a marriage with only a pair of shoes as *Mahr* and approved of a poor man who did not possess even an iron ring, giving his wife instruction in Quran as *Mahr*.⁶ According to Fyzee the object of dower is twofold.

1. To impose an obligation on the husband as a mark of respect of the wife and
2. To place a check on the capricious use of divorce on the part of husband.

Another object of dower is to provide a woman her subsistence after her marriage or by divorce.

The concept of dower is also found in other religion such as Jewish and Roman law. The Jewish Law as regards dower is that, a marriage without consideration is invalid. The Roman law also provides for *Mahr* to the wife. Some jurists compare the Islamic concept of dower with Roman concept of dower and say that it is similar to the Roman doctrine. But in reality it is not so. Because in Roman doctrine, the payment of dower is voluntary where as it is absolutely obligatory

6. Ibid

INTRODUCTION

under Islamic law. Ameer Ali⁷ also says that 'the difference between the two is that under the Roman law it is not obligatory but depends upon the will of the husband to pay it or not where as under the Islamic law its payment is absolutely necessary. The marriage institution enjoins some right and obligation on both the spouses. These rights and obligations are equal in some respect to both the spouses but unequal in some other respect. One of these obligations is that the husband has to pay dower to his wife in marriage. This is so much obligatory that if the dower is not fixed at the time of marriage then it will be presumed by law.

This *Mahr* is any amount or property under Islamic Law which has some monetary value, the wife is entitled to get it from her husband. Mulla defines it as a sum of money or other property which the wife is entitled to receive from the husband in consideration of marriage.⁸

Any property given by the parents or the family members of the girl at or before any time after the marriage in connection with the marriage of the said parties shall be covered by the term dowry.⁹

7. Ameer Ali: *Mohammadan Law*, (1982) p. 450.

8. Mulla, *Principles of Mohammadan law*, 17th Ed. P. 27: See also *Nasra Begum Vs. Rizwan Ali*, AIR 1980 All 118 at PP. 119.120 (DB)

9. *Rajeev Vs. Ram Kishan Jaiswal*, 1993, JIC, 170.

INTRODUCTION

According to *Fatawa-i-Qazi Khan*, *Mahr* is so important for the solemnization of marriage that if it was not mentioned at the time of the marriage or in the marriage contract. The law will presume it by virtue of the contract itself. It is so essential incident of marriage under Islamic law that even if there is a stipulation on the part of the women before marriage to forego all her rights to dower or even if she agrees to marry without any dower; the stipulation or agreement will be invalid.

The reason of its importance lies in the protection that it imparts to the wife against the arbitrary exercise of the power of divorce by the husband. Under Islamic law, the husband can divorce his wife at his whim so the subject matter of dower is to check upon absolute power of the husband to terminate the marriage at any time without any cogent reason. It not only protects from his unbridled power to divorce but also from his extravagance in having more than one wife. A stipulation to charge a huge dower on the occasion of his another marriage is enough to deter him from enjoying the option of having more than one wife at a time. In *Abdul Kadir Vs. Salima*,¹⁰ Mahmood J. has observed the marriage contract is easily dissoluble and the freedom of divorce and the rule of Polygamy place the power in the hands of the husband which the law giver intended to restrain by rendering the rules as to

10. ILR (1886) 8 All, 149.

INTRODUCTION

payment of dower stringent on the husband. That is why the right of the wife to her dower is a fundamental feature of marriage contract.

The question with regard to dower does not arise in case of marriages solemnized under special Marriage Act, 1954. But the right to *Mahr* fixed in a marriage first contracted under Muslim law will not be forfeited merely by the fact of registration of the marriage under Special Marriage Act, 1954.

Prompt dower is an absolute right of wife to recover it and while it may be open for husband to enforce his right in a suit for restitution of conjugal rights, prompt dower cannot be made conditional on wife residing with the husband.¹¹

The wife is entitled to recover her prompt dower at any time before or after consummation. Consummation has not the effect of converting the prompt dower into deferred dower.¹²

1. Objectives of the Study

The objective is to undertake this research work pertaining to:

- (1) What was the position and concept of dower before Islam and what reforms were made in this sphere by Prophet (P.B.U.H.) after the advent of Islam.

11. *Karam Vs. Johurbi*, AIR 1930 Nag 270.

12. *Mohd. Taqui Ahmad Vs. Farmoodi Begum*, AIR 1941 All 181.

INTRODUCTION

- (2) What is true nature of *Mahr*? Whether jurists of Muslim law and the judiciary have ever tried to explore the real meaning, nature and concept of *Mahr* or not?
- (3) What is the nexus of *Mahr* with the institution of marriage and what will be the impact on the validity of marriage if mahr not settled at the time of marriage.
- (4) What is the present state of affairs as regards to its enforcement and workability in the existing socio-economic conditions in India and abroad?
- (5) What remedies are available to the wife for non-payment of dower at the time of marriage or after dissolution of marriage?
- (6) To what extent codification of laws regarding *Mahr* has taken place in the sub-continent and elsewhere in the world.
- (7) How can dower be used as an effective means to ensure economic safeguard to the women in present society?
- (8) What is the present trend of fixing the dower as prompt or deferred and how can it be realized by the woman from the husband?

2. Hypothesis

The research proceeds on the following hypothesis:

Most of the Muslim women are not aware about actual effect of their rights to get mahr from their husbands. This right may prove a means for stabilizing the marital relations.

The right of the wife to get mahr can play a very important role in the economic empowerment of the female if dower is fixed according to the socio and economic status of the parties.

INTRODUCTION

The amount of dower and a fair provisions relating to maintenance if awarded together by the Court at the time of divorce. Then, she would be able to receive handsome amount of money from her husband that can be utilized by her in more effective manner to lead a dignified life as compare to seeking maintenance from her husband monthly under section 125 of the Cr.P.C.

3. Impact of the Study

Muslim Community will become aware about the importance of *Mahr* in the contemporary society and must be able to utilize such concept in more effective manner within the spirit of Quran and Hadith for their betterment. The impact of the study would add something to the existing literature and practices prevailing in the society pertaining to the subject and provide best use of *Mahr* in present and in the future.

4. Methodology

Methodology adopted is doctrinal and analytical. This study is basically based on fundamental sources of Islamic law viz., The Quran, Hadith and the juristic works in English, Urdu and Arabic languages. Journals, books, reports and articles published have been used for assessing the present legislative and judicial trends in India and Muslim countries. Leading decisions on the subject of Privy Council, Supreme

Court of India, High Court of States and even decisions of Districts courts of Aligarh and Agra have been analyzed to examine, identify and spell out the misconceptions and inconsistencies that have crept into the working and usefulness of the institution of *Mahr*.

5. Chapter wise Introduction: I have divided my thesis in VI Chapters. The brief chapter-wise contents are as under:

Chapter I has been devoted to the study of the origin and development of the law on *Mahr* with reference to the *Quranic* directions, practices of the prophet (P.B.U.H.) and the later developments.

Chapter II is the study of concept, meaning and nature of *Mahr* and the real object of *Mahr* in Islam.

Chapter III deals with the relevance of *Mahr* with the institution of marriage and what will be the effect on the validity of marriage. If not fixed at the time of Marriage and also deals with the subject matter of *Mahr* and its quantum in the light of Hadith and common usages and practices. Impact of modern litigations on the amount of *Mahr* has also been considered herein.

Chapter IV In Chapter IV of thesis it is discussed that what are different kinds of *Mahr* and how they can be realized by the wife from her husband.

INTRODUCTION

Chapter V is an endeavour to determine the extent of entitlement of Muslim women to *Mahr* in cases of extra judicial as well as judicial divorces. Chapter also incorporates the principles of Islamic law and a detailed account of judicial precedents about the nature and scope of the widowed woman claim to *Mahr* especially the "widow's right of retention".

Chapter VI gives a review of the statutory laws related to *Mahr* in different Muslim country with reference to the relevant classical law.

In the concluding chapter, the impressions from the various findings in this study have been stated and some suggestions have accordingly been articulated to make the institution of *Mahr* useful for Muslim society in general and the Muslim women in particular.

CHAPTER - I

HISTORICAL RETROSPECT

1. DOWER: PRE-ISLAMIC SOCIETY
2. DOWER: ISLAMIC SOCIETY
3. THE RELEVANT AHADITH ON *MAHR*:
 - A) OBLIGATORY CHARACTER OF *MAHR*
 - B) SHIGHAR PROHIBITED
 - C) QUANTUM AND SUBJECT MATTER OF *MAHR*
 - D) *MAHR* AND KHUL
 - E) *MAHR* AND LI'AN
 - F) *MAHR* AND VOID MARRIAGES
 - G) WIDOW'S *MAHR*
 - H) *MAHR* AND THE NEW CONVERTS
 - I) *MAHR* AND THE ORPHAN BRIDES
 - J) *MAHR* AND MUTD
4. *MAHR*: OUTSIDE INDIA:
5. POSITION OF *MAHR* IN INDIA

1. Dower: Pre-Islamic Society

Before the advent of Islam Arabic Society was socially, economically and politically was highly imbalanced. It was primarily a male dominated society. The concept of equality between the sexes was unknown species. The male domination on powers economic, social and political had established a number of customs and practices through which they enjoyed absolute supremacy over woman. Turning back the long pages of history and wiping out the dust of time from the sketch of a woman, on the pages during just before Islam in Arabia, there appears before eyes a woman's sketch handcuffed and chained with drooping head, and tearful eyes. Conforming to all pre-requisites of human being, although, she was subjected to a sub-human treatment by the man. Having a heart to the left and a superbly human mind she was reduced to a nonentity by the cruel hands of the then prevailing situation. Her position in the domestic surrounding was not more than a saucepan, or kettle, so much, so that with all the other belonging of the deceased she was an object worth, inheriting and worth distributing. She was treated as a chattel marketable and transferable and a subject of testamentary disposition.¹

1. Ameer Ali: Spirit of Islam, 220 (1965).

In Pre-Islamic Arabia the birth of a daughter was considered to be a sin. In *alkashaf* and other commentaries stated² "that when a daughter was born to someone and somebody wanted to congratulate him, he used to say (*hani' an takan afijah*), that is congratulation may she be a source of wealth (lit a pouch of musk) for you. This was an illusion to be fact that father of the girl would marry her in future and would receive the dower". This means the father had relieved the dower amount from the boy's family, and the dower will be as a sale price of the girl.

A woman was not a free agent in contracting marriage. It was the right of her father, brother or cousin or any other male relative or guardian to her in marriage, whether she was old or young, widow or virgin to whomsoever she chose.³ Her consent was immaterial. The amounts of *Mahr* in those days were handed over to the girl's father, brother or cousin, in whose guardianship the girl was. What was usually given to the women at the betrothal is the *sadaq*, the *Mahr* being the purchase price, of the bride was given to the wali.⁴

The concept of dower has passed through four different stages.⁵

In the pre-Islamic times human being led a savage life, lived in tribal

2. Murtada Mutabbari: *The right of woman in Islam*, 204 (1981).

3. Sir Abdur Rahim: *Mohammadan Jurisprudence*, 9 (1958).

4. E.J. Brills: *First Encyclopedia of Islam*, 137 (1938).

5. Murtada Mutabbari: *The right of woman in Islam*, 192 (1981).

groups and that for unknown reasons marriage among blood relation used to be considered taboo. The Youngman of the tribe who wished to marry were obliged to make selection of their spouses and lovers from other tribes and for that purpose, they had to approach the other tribe to make his choice. In those ages, man was not aware of the part he played in the birth of a child. Man lived as a parasite and as attendant on woman. The man had complete domination over the women's properties.

In the second stage, too marriage between blood relation was not admissible and man was obliged to select his spouse from some other tribe and bring her to his own tribe. Selection of spouse by means of abduction was there. In other words, a young man used to abduct the girls of his choice from other tribe for the purpose of marriage.

The third stage the custom of abduction became unnecessary, and in order to get girl of his choice man used to bind himself to the service of the father of the girl and in lieu of the services rendered by the would be son in law, the father of the girl gives his daughter to him and then he would bring that girl to his tribe.

Eventually the economic situation improved, and man instead of working for years for the father of the bride it was preferred to present

a worthy gift to him at the time of marriage, and thus obtain his daughter from him. He began to do this and from this, the dower came into existence.

There is also a fifth period⁶ about which sociologist and theory makers are silent. This is the period in which man on the occasion of marriage present a gift to the woman herself. Neither of the parent has any share or right in that gift.

Fyzee⁷ was of the opinion that in pre-Islamic society two kinds of marital gift were present. In a certain type of marriage, the so called bina marriage where the husband visited the wife but did not bring her home the wife was called *sadiqa* or a female friend and a gift given to the wife on marriage was called as *sadaq*. In Islam *sadaq* is synonymous with *Mahr*. But originally the two words are quite distinct *sadaq*, is a gift to the wife and *Mahr* to the parent of the wife the latter term belong to the matter of dominion which is known as ball marriage where the wife's people part with her and have to be compensated. In these marriages the gift's given to the wife's would be her absolute property.

6. Murtada Mutabbari: The rights of woman in Islam, 193 (1981).

7. Fyzee A.A.: Outlines of Mohammadan Law, 133 (1978).

In regular for of marriages, the fixing of *Mahr* or dower was found in the old Arab society, but it was in the vague form. Generally they were deprived of it by their guardians.⁸ In pre-Islamic society, it was an essential condition to the validity of marriage that the husband should settle a certain dower, which becomes her exclusive property. Such at least was the established custom, though owing to the absence of organised system of law or justice the custom was often more honoured in the breach than in the observation.

2. Dower: Islamic Society

The status of woman in that is after the rise of prophet Mohammad (P.B.U.H.) on the Arab scene in the seventh century A.D. was great enhanced an abhorrent practice by some Arab Jahilliyyah that was the practice of female infanticide was forbidden by prophet Mohammad (P.B.U.H.).⁹

Islam, one of the great religions of the world, whose followers are found in every country and continent, introduced that concept of universal brotherhood and non-discrimination among Muslims on the ground of sex. It is recognized as the rights of women pertaining to marriage, property and inheritance. Woman as human being are

8. Sir Abdur Rahim: *Mohammadan Jurisprudence*, 8 (1958).

9. *Id* at 7.

entitled to similar rights to life and honour. The reward for their good deed is similar both male and female. Men and women are considered as member of a family.¹⁰ Allah ordained:

*And their Lord hath accepted
Of them, and answered them:
"Never will I suffer to be lost
The work of any of you,
Be he male or female:
Ye are members, one of another.
Those who have left their homes,
And were driven out therefrom,
And suffered harm in My Cause,
And fought and were slain, -
Verily, I will blot out
From them their iniquities,
And admit them into Gardens
With rivers flowing beneath:-
A reward from Allah
And from Allah
Is the best of rewards." ¹¹*

The exchange of daughter was also abolished by Islam.¹² There was a custom that one man used to say to the other, I will marry my daughter or sister to you in exchange for your daughter (or sister) becoming my wife". The other man then would agree to it. In this way the two girls become the dower for the other girl and were married to the father or brother of other girl. Such kind of marriage was called as higher marriage. Islam annulled this custom.

10. M. Muslehuddin: Sociology and Islam, 155 (1977).

11. Al-Quran: III:195.

12. Murtada Mutabbari: The rights of woman in Islam, 205, 105 (1981).

The Holy Prophet commanded:

"That is the exchange of daughter of sister is forbidden in Islam".

However, this custom was abolished in Islam and the father of the girl has no right to consider the dower as his property even if his aim and motive was to spend it for the daughters.

The inheriting of wife was also abolished by Islam.¹³ In the case of death of a man, his inheritors, like his son or brother inherited his wives exactly in the same way as they inherited the property of the deceased. After the death of a man, the son or brother of the deceased assumed that the marriage right was still valid and considered himself empowered to marry the wife to anybody he like and take the dower for himself or otherwise to take her as his own wife without a new dower on the strength of the dower that the deceased has paid for her in the past.

The Holy Quran annulled the custom and ordained that:

*O ye who believe!
Ye are forbidden to inherit
Women against their will.
Nor should ye treat them
With harshness, that ye may
Take away part of the dower
Ye have given them,-except
Where they have been guilty*

13. Ibid.

*Of open lewdness;
On the contrary live with them
On a footing of kindness and equity
If ye take a dislike to them
It may be that ye dislike
A thing, and Allah brings about
Through it a great deal of good.¹⁴*

In another verse Holy Quran prohibits absolutely marriage with the wife of the father, even if it is not by way of succession, and even if she wishes to marry of her own free will. Holy Quran ordained:

*And marry not women
Whom your father married,-
Except what is past:
It was shameful and odious,-
An abominable custom indeed.¹⁵*

In this way Islam abolished all the custom which was derogatory to the status of women. It also closed the doors of devices of the payment of dower and made it absolutely of the woman property. The Holy Quran says:

*Also (prohibited are)
Women already married,
Except those
Whom your right hands posses:
Thus hath Allah ordained
(Prohibition) against you:*

14. Al-Quran, IV:19.

15. Al-Quran IV:22.

*Except for these, all others
Are lawful, provided
Ye seek (them in marriage)
With gifts from your property,-
Desiring chastity, for fornication.
Give them their dowery
For the enjoyment you have
Of them as a duty; but if,
After a dower is prescribed, ye agree
Mutually (to vary it),
There is no blame on you,
And Allah is All-knowing
All-wise.¹⁶*

Another place Quran further says:

*If any of you have not
The means wherewith
To wed free believing women,
They may wed believing
Girls from among those
Whom your right hands possess:
And Allah hath full knowledge
About your faith.
Ye are one from another:
Wed them with the leave
Of their owners, and give them
Their dowers, according to what
Is reasonable: they should be
Chaste, not fornicators, nor taking
Adulterous: when they
Are taken in wedlock,
If they commit indecency*

16. Al-Quran, IV:24.

*Their punishment is half
That for free women.
This (permission) is for those
Among you who fear sin;
But it is better for you
That ye practice self-restraint.
And Allah is Oft-forgiving,
Most Merciful.¹⁷*

In pre-Islamic days it often happen that Arab after despoiling their wives turned them out a drift, absolutely helpless and without means. So Islam made it an essential incident of a valid marriage. Therefore the husband must settle on the wife a certain dower which became her exclusive property. The Holy Quran says:

“If you separate yourself from your wives, send them away with generosity, it is not permitted to you to appropriate the goods you have once given to them.”

Although dower is an essential part of marriage but the marriage is not invalidated if it is not paid or contracted before marriage. The Holy Quran says:

*A divorce is only
Permissible twice; after that,
The parties should either hold
Together on equitable terms,
Or separate with kindness.
It is not lawful for you,
(Men), to take back*

17. Al-Quran, IV:25.

*And of your gifts (from your wives),
 Except when both parties
 Fear that they would be
 Unable to keep the limits
 Ordained by Allah
 If ye (judges) do indeed
 Fear that they would be
 Unable to keep the limits
 Ordained by Allah,
 There is no blame on either
 Of them if she give
 Something for her freedom
 These are the limits
 Ordained by Allah;
 So do not transgress them
 If any do transgress
 The limits ordained by Allah,
 Such persons wrong
 (Themselves as well as others).¹⁸*

It explains that- "it is not sin for you if you divorce woman while yet ye have not touched them nor appointed to them a portion i.e. dower."

There was a number of traditions about the *Mahr* and these pave the way for the theories laid down by the jurist in the fiqh book. From all the tradition it is clear that *Mahr* is a dominant factor in marriage.¹⁹

Depending upon the financial capacity of bridegroom the amount of *Mahr* should be kept light. And should discard the custom of old

18. Al-Quran, II:229

19. E.J. Brills: First Encyclopedia of Islam, 137 (1938).

Arab tribe and clan which make contracting of marriage a heavy financial burden.

Quran says:

*There is no blame on you
If ye divorce women
Before consummation
Or the fixation of their dower;
But bestow on them
(A suitable gift),
The wealthy
According to his means,
And the poor
According to his means;-
A gift of a reasonable amount
Is due from those
Who wish to do the right thing.²⁰*

Hadrat Ayesha reported that the messenger of Allah said-

"The greatest blessing in the marriage is that of one which gives the least trouble."²¹

The dower under the Islamic law is essential incident for marriage, it does not matter how much is its amount. And the *Mahr* absolutely belong to the wife.

Dower in the present form was introduced by the Prophet Mohammad (P.B.U.H.) and made obligatory by him in case of every

20. Al-Quran, II:236

21. Mohd. Imran: Ideal woman in Islam, p. 15 (1986).

marriage. As it is stated earlier it is similar to the Roman doctrine and like sadaq it is paid to the wife.

As Quran says:

*And give the women
(On marriage) their dower
As an obligation; but if they,
Of their own good pleasure,
Remit any part of it to you,
Take it and enjoy it
With right good cheer.*²²

3. The Relevant Ahadith on *Mahr*:

a) Obligatory character of *Mahr*

The obligatory character of *Mahr* is evident from various ahadith.

A famous Hadith is quoted below in this respect:

A woman came to Allah's Messenger and said "O Allah's Messenger I have come to give myself in marriage to you". Allah's Messenger lowered his gaze ... She said so thrice ... One from among the companions of Allah's Messenger got up and expressed his desire to marry her. On this the Prophet (SAW) said, 'Have you got anything to offer as Mahr'? The Man said, "No, By Allah, O' Allah's Messenger".

The Prophet (SAW) said, "Go to your home and see if you have something".

The man went to his home and returned, saying, "No, by Allah, I have not found anything".

Allah's Messenger said, "(Go again) and look for something even if it is an iron-ring".

22. Al-Quran, IV:4

He went again and returned, saying, 'No by Allah 'O' Allah's Messenger, I could not find even an iron ring but this is my Izar (Waist-sheet)' ... He had no rida. He added, "I give half of it to her".

Allah's Messenger said, "what will she do with your Izar? If you wear it she will be naked, and if she wears it, you will be naked" ... How much of the Quran do you know?

He said, "I know such and such Sura" Counting them

The prophet (SAW) said, 'Do you know them by heart?

He replied, "Yes ..."

The Prophet (SAW) said, "Go I let you marry her for that much of the Quran, which you know, as Mahr"²³

This Hadith throws much light on the fact that *Mahr* is binding in every situation irrespective of its value and quantum. It may be even an iron ring. The main object is to offer it with an open heart as a gift. This is implied that *Mahr* must be determined with reference to the status of the parties.

b) Shighar prohibited

Narrated Ibn Umar (HA):

Allah's Messenger (SAW) forebode al-Shighar, which means that somebody gets his daughter married to somebody else, and the latter gets his daughter married to the former without paying Mahr.²⁴

c) Quantum and subject matter of Mahr

Narrated Anas (RA):

Abdur Rahman bin 'Auf married a woman and gave her gold equal to the weight of a date-stone as Mahr. When the Prophet (SAW) noticed

23. Sahih Bukhari, Kitab-al-Nikah, Chapters 1.5, 33 and 35.

24. Ibid, Chapter 29

the signs of cheerfulness of the marriage (on his face) and asked him about it, he said, "I have married a woman and gave her gold equal to the date-stone in weight as Mahr". He also reported that the Prophet (SAW) said "Give a feast even, with a sheep".²⁵

Allah's Messenger (SAW) manumitted Safiyyah and then married her and her Mahr was manumission and he gave a wedding banquet with hais -- a sort of sweet dish made from butter, cheese and dates.²⁶

S'ahl (RA) narrated:

The Prophet (SAW) said to a man, "Bring even an iron-ring (as Mahr)"²⁷

Abu Huraira (RA) reported:

A man came to Allah's Messenger (SAW) and said: I have contracted marriage with a women of Ansar, where upon Allah's Apostle (SAW) asked -- for what Mahr did you marry her. He replied 'four' uqiyas. The Allah's Apostle (SAW) remarked it seems as if you dig out silver from the side of this mountain (so agree to higher Mahr.)²⁸

Abu Salama b. 'Abd al-Rahman (RA) reported:

I asked Aisha (RA) the wife of Allah's Messenger (SAW) what is the amount of Mahr of Allah's Messenger?

She said:

It was twelve uqiyas and one nash

She asked:

Do you know what is al-nash?

I said, "No"

She said,

It is half of an uqiya, and it (the whole Mahr) amounts to five hundred dirhams and that was the Mahr given by Allah's Messenger to his wives.²⁹

Anas (RA) has reported:

25. Id. Chapter 50

26. Id. Chapter 69

27. Id. Chapter 15

28. Sahih Muslim, Kitab-al-Nikah

29. Ibid

*Abu Talhah married Omme Solaim and the Mahr between them was Islam. Omme Solaim accepted Islam before Abu Talhah who afterwards sought her in marriage. She said: I have surely accepted Islam; but if you accept Islam, I shall marry you. He accepted Islam and it was their Mahr between them.*³⁰

d) *Mahr and Khul*

Narrated Ibn Abbas (RA)

The wife of Thabit bin Qais came to the Prophet (SAW) and said 'O' Allah's Messenger (SAW) I do not blame Thabit for defects in his character or his religion, but I being a Muslim, dislike to behave in un-Islamic manner if I remain with him i.e. "I cannot endure to live with him or I am afraid that I may become unthankful for Allah's blessings."

On that Allah's Messenger (SAW) said to her, "Will you give back the garden which your husband has given you as Mahr?"

She said, "Yes".

*The Prophet (SAW) said to Thabit, 'O' Thabit accept your garden and divorce her once.'*³¹

Ata (RA) narrates:

*"Prophet (SAW) said, take not anything more than Mahr for khul' from women."*³²

e) *Mahr and Li'an*

Narrated Sa'id bin Jubair:

I asked Ibn Umar, "What is the verdict if a man accuses his wife of illegal intercourse". Ibn Umar said, "The Prophet (SAW) separated (by dissolution of marriage) the couple of Bani Al-Ajlan and said to them Allah knows that one of you two is a liar; so will one of you repent?" But both of them refused, so he (SAW) separated them by divorce.

30. Al-Nasai

31. Sahih Muslim, Kitab-al-Talaq, Chapter 12.

32. Musannad Imam Azam, Kitab-al-Talaq, p. 273 (Deoband), 1967.

The man said, "What about the Mahr that I have given to my wife?". It was said, "You have no right to restore any money for if you have spoken the truth you have also shared life with her and if you have told a lie, you are less rightful to have your money back."³³

f) Mahr and void marriages

Al Hasan al-Basari (RA) said:

If a person mistakenly marries a women from the forbidden degrees of consanguinity (i.e. maharam). They should be separated with divorce, and she would keep what she has taken as Mahr and she would not be entitled to take anything else. Later on Al-Hasan said: She would be entitled to take her full Mahr.³⁴

g) Widow's Mahr

Narrated Abdullah Ibn Mas'ud (RA):

For a woman whose husband has died and neither her Mahr has been fixed nor the marriage consummated, there is mahr-al-mithal (proper Mahr).³⁵

h) Mahr and the new converts

(What) if a pagan or a Christian woman becomes a Muslim while she is the wife of a dhimmi (i.e. a non-Muslim under the protection of a Muslim Government) or a pagan at war with the Muslims?, Ibn Abas (RA) said:

"If a Christian woman embraces Islam before her husband by a short while she will by no means remain as his wife legally"³⁶

Ata' was asked about a woman from the pagans who had a treaty with the Muslims. She embraced Islam and during her iddat, her husband embraced Islam too? Could he retain her as his wife?, Ata (RA) said:

33. Supra Note 31, Chapters 32 & 52

34. Id. Chapter 51

35. Supra Note 32

36. Supra note 31, chapter 20

*'No', unless she is willing to marry him with a new marriage and new Mahr.*³⁷

Ibn Juraij said 'I asked 'Ata,

"If a pagan woman comes to the Muslims (i.e. embraces Islam), will the husband be compensated for losing her as is indicated by the settlement of Allah".

*"They are not lawful for the dis-believers, nor are the disbelievers lawful for them. But pay the disbelievers what they have spent (on their Mahr).*³⁸

Ata replied,

"No, for this (return of the amount to disbelievers) was for only between the Prophet (SAW) and those persons who made a treaty with him".

And Mujahid said:

*"All this was for only a treaty between the Prophet (SAW) and the Quraish"*³⁹

i) *Mahr and the orphan brides*

Narrated Urwa that he asked Aisha (HA) about the Quranic verse:

*If ye fear that ye shall not be able to deal justly with the Orphan girls, then marry (other) women of your choice, or (the captives) that your right hands possess. That will be nearer to prevent you from doing injustice.*⁴⁰

Aisha (RA) said:

*'O' my nephew; This verse refers to the orphan girls. If such a girl is under the protection of a guardian who likes her beauty and wealth and wishes to marry her with lesser Mahr. Such guardians have been forbidden to marry them unless they do justice by giving them their full Mahr, and they have been ordered to marry women other than them.*⁴¹

37. Ibid

38. Quran LX:10

39. Supra note 36

40. Al Quran IV:3

41. Supra Note 31, Chapter I, 17 and 44

j) *Mahr and Muta*⁴²

Rabi B. Sabra reported that his father went on an expedition with Allah's messenger (SAW) during the victory of Mecca and "we stayed there for fifteen days, and Allah's Messenger permitted us to contract temporary marriage. I and another person of my tribe went out. I was more handsome than he, whereas he was almost ugly. Each one of us had a cloak. My cloak was worn out, whereas the cloak of my cousin was quite new. We reached the lower or upper side of Mecca where we came across a young woman ... We said: Is it possible that one of us may contract temporary marriage with you? She said, what will you give me as *Mahr*? Each one of us spread his cloak. She began to cast a glance on both the persons. My companion also looked at her when she was casting a glance at her side and said: This cloak of his is worn out, whereas my cloak is quite new. She, however, said twice or thrice: There is no harm in accepting this cloak (the older one). So I contracted temporary marriage with her, and I did not come out of this until Allah's Messenger (SAW) declared it forbidden.⁴³

Sabra al-Juhanni reported that while he was with Allah's Messenger (SAW), he (SAW), said "O' people, I had permitted you to

42. Muta is considered as permissible by Athna Asharis only

43. Supra Note 28

contract temporary marriage with women, but Allah has forbidden it (flow) until the Day of Resurrection. So he who has any (woman with this type of marriage) he should leave her off, and do not take back anything you have given to them as *Mahr*."44

4. MAHR: Outside India:

Institute of Mahr has been Islamically recognized worldwide in one form or another. In countries like Iraq and Syria, in the absence of any agreement to the contrary regarding the nature of dower, a portion of *Mahr* becomes payable is the safe at the time of marriage on demand and the remainder at the later date. In Pakistan and Bangladesh in such a case the entire *Mahr* has been made payable on demand.⁴⁵ Another, practice regarding payment of *Mahr* being payable in an irregular marriage has received statutory recognition in Syria.⁴⁶ Country like Algeria has different kind of practice, regarding *Mahr*, where marriage still approximates is a form of purchase in which the *Mahr* is paid is the bride's father by the husband, and is largely reserved by line of should the marriage be terminated either form her father on person or from the husband to whom she is given in marriage.⁴⁷

44. Ibid

45. Iraqi Cock of Personal Status, 1959:20: Syrian code of Personal Status, 1953-1975:55.

46. Fancy Law ordinances, 1961 & 10.

47. Code of 1953, 51 (2)(a).

In some countries, fathers make such excessive demands of *Mahr* in regard to their daughters as to make it very difficult for a young man to marry. Sometimes higher *Mahr* is fixed as a status symbol for the family irrespective of being a symbol of mutual love and affection. This has involved legislative response to the extent that under the family law of South Yemen 1974, it has been provided that *Mahr* (Prompt and deferred together) must not exceed 100 dinars. The Somalian Family Code, 1975 permits as maximum *Mahr* an amount not exceeding 1000 local levelling.⁴⁸

The Moroccan Code of Personal status, 1958 restricts a guardian from opposing the marriage of a girl for an inadequate *Mahr* which she herself is willing to accept.⁴⁹ Also the father or guardian of the bride is statutorily restricted from demanding any money from the husband for handling her over to him or for acting as a guardian.⁵⁰ Moreover, for the determination of the amount of *Mahr* in cases of dispute legislation has been made in Egypt, Lebanon, Jordan, Sudan and Morocco.⁵¹

About right to *Mahr* on marriage dissolution, the Syrian Code provides that if the consideration for *khul* is fixed as something other than the *Mahr* this consideration is binding and both parties are also

48. Code of 619 Article 24 of Somalian Family Code, 1975.

49. Article 23 of Moroccan Code of Personal Status, 1958.

50. Ibid, Article 19.

51. Egypt, 1929; Lebanon 1917: 86-87; Jordan 1976:5758, Sudan 1935: 10 Morocco 1958:24.

released from any obligation regarding *Mahr*.⁵² Where the parties do not name any consideration, the *khul'* shall take effect and both parties shall be released from the rights of the other regarding *Mahr* and maintenance.⁵³

The Ottoman law of Family Rights, 1917 deprives a divorced wife of her *Mahr* or makes her return not more than half of her *Mahr* where the whole *Mahr* has already been paid, if it appears that she alone was "responsible for the breakdown of marriage."⁵⁴ Under the Moroccan Code of Personal Status, 1958, the payment of *mata-e- talaq* does not remain obligatory where the *Mahr* was specified.⁵⁵ But among the Ismaili Khojas of East Africa under Article 273 of their Constitution of 1962 compensation remains payable to the wife on the dissolution of marriage in addition to *Mahr* where the husband is responsible for breakdown.

One more dimension of the legislations about *Mahr* is represented by Pakistan Muslim Family Law Ordinance, 1961, which has utilized *Mahr* as a means, though mild, of discouraging polygamy. The relevant provision is as follows:

52. Article 98 of Syrian Code of Personal Status, 1953-75.

53. Id, Article 98.

54. Article 130 of Ottoman Law of Family Rights of 1958.

55. Article 6 Moroccan Code of Personal Status, 1958.

Any man who contracts another marriage without the permission of the Arbitration Council shall -

*pay immediately the entire amount of the Mahr whether prompt or deferred, due to existing wife or wives, which amount, if not paid, shall be recovered as arrears of land revenue;*⁵⁶

It further appears that an effort is going on in various countries to make the relevant statutes more certain and just. By way of an example, we may mention below some provisions of the Syrian Code of Personal Status, 1953 as amended in 1975:

Article 54:

- (iii) *Mahr* shall be treated as a preferential debt...
- (iv) where it is claimed that the stipulated *Mahr* is fictitious or fraudulent, either party can prove it. If the said *Mahr* is not proved to be real, the judge shall enforce 'prompt *Mahr*'.
- v) Every '*Mahr* - debt' stipulated in the deed of marriage or divorce shall be regarded as a secured debt ... Deferred '*Mahr*' shall be payable before the expiry of *iddat*.

Article 57:

Increase or decrease in the amount of *Mahr* whether during the subsistence of a marriage or during *iddat*, shall be void if not made in the Court, where this is done by mutual consent the action must be registered.

56. Section 5(a) Family Law Ordinance, 1961.

Article 60:

- (i) The *Mahr* is the due right of a married woman and a husband will not be absolved of his liability except by its payment to her provided that she is legally competent to receive it, unless a particular person is appointed to receive it.
- (ii) The law of set-off (*taqaddam*) shall not apply to prompt *Mahr* during marriage though the same might have been stipulated in the deed of marriage.

These provisions of the Syrian Code have strengthened the women's claim to *Mahr* and have garbed the relevant law with certainty.

In the cases regarding *Mahr* and divorce, some instances of judicial activism are also reported. In Pakistan through Lahore High Court, the Muslim wives have been given the right to a judicial divorce, on repayment of their *Mahr* on grounds which amount to incompatibility of temperament or breakdown of marriage.⁵⁷

The Court has based its decision on the following Quranic verse:

*A divorce is only
Permissible twice; after that,
The parties should either hold
Together on equitable terms,
Or separate with kindness.
It is not lawful for you,
(Men), to take back
And of your gifts (from your wives),*

57. *Balqis Fatima Vs. Naim ul-Ikram Qureshi*, PLD 1959, Lah. 566.

Except when both parties
 Fear that they would be
 Unable to keep the limits
 Ordained by Allah
 If ye (judges) do indeed
 Fear that they would be
 Unable to keep the limits
 Ordained by Allah,
 There is no blame on either
 Of them if she give
 Something for her freedom
 These are the limits
 Ordained by Allah;
 So do not transgress them
 If any do transgress
 The limits ordained by Allah,
 Such persons wrong
 (Themselves as well as others).⁵⁸

The decision is supported by a *hadith* in which the Prophet (SAW) is said to have asked a husband whose wife had taken a dislike to him, although he had not in fact ill-used her, to accept the return of her *Mahr* and then repudiate her.⁵⁹ The Supreme Court of Pakistan has upheld this Lahore decision.⁶⁰

5. Position of *Mahr* in India

In India the institution of *Mahr* enjoys full recognition as a part of Muslim Personal Law. It has been saved from any effect by the

58. Al-Quran, II:229.

59. Adu Dawud, Sunan, Vol. 1, p. 303.

60. *Khurshid Bibi Vs. Muhammad Amin*, PLD 1967, SC 97.

anti-dowry legislations.⁶¹ The right of a wife to *Mahr* is also not affected by any decree of divorce granted under the provisions of the Dissolution of Muslim Marriages Act, 1939.⁶² However, as regards the working of the institution of *Mahr* in India one fails to record uniformity about the actual practices prevalent at different places or within different families. No uniform rate of *Mahr* exists even in the same area. In some cases it is much lower than the reasonable while as in others it is much higher than desirable. It ranges from rupees fifty upto some crores.

The fixation of *Mahr* takes place usually at the time of marriage. Customarily at some places the half of the stipulated *Mahr* is deemed as 'prompt' and the remaining part as deferred. The deferred *Mahr* is being paid either after divorce or is being realized after the death of the husband. Where no specific terms and conditions are given about *Mahr* in nikahnama, the Courts decide the cases according to the 'customs prevalent in respective regions'. In case no *Mahr* has been fixed at the time of marriage *Mahr al-mithal* is payable which is determined with

61. Dowry Prohibition Act, 1961, Section 2.

62. Dissolution of Muslim Marriage Act, 1939.

reference to *Mahr* fixed or payable in cases of the wife's paternal relations like paternal aunts and sisters.⁶³

The husband is legally bound to pay the whole of *Mahr* to the wife even if the stipulated amount is beyond his means. The relatives of the wives have not been passive in the realization of *Mahr* from husbands especially in cases of marriage breakdown or where there is apprehension of such breakdown. Only in the earlier state of Oudh provisions were made for the relief of the husbands under the debt of higher *Mahr* in Section 5 of the Oudh Laws Act, 1876.

The Courts in that area were empowered to fix a fresh reasonable amount of *Mahr* with reference to the husband's means and the status of the wife. Similar law is found in Jammu & Kashmir enacted in Section 2 of the Jammu & Kashmir Muslim Dower Act, 1920. In both places the provision is applicable only to the persons having a local domicile. The Privy Council has held in a case that if a man residing outside Oudh goes to that area and marries within its territory the provisions of the Section 5 of the Oudh laws Act, 1876, cannot be invoked.⁶⁴

63. T. Mahmood, *Muslim Law of India*, p. 71-79.

64. *Zakeri Begum Vs. Muhammad* (1910) 32 Al. 477.

CHAPTER- II
**DOWER: A CONCEPTUAL
ANALYSIS**

- Dower: Secular Understanding Meaning and Nature
- Nature of *mahr* as an Islamic Legal Concept of *Mahr*
- Socio-Legal Significance of *mahr* in the Islamic Society
- Some pre and non-Islamic concepts confused with *Mahr*

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

The concept of dower is not only the innovation of Islamic Law but it was also found in the Pre-Islamic Arab Society. However, it was not as found in the present Islamic law. This was so because of the various ways of adopting wife and the poor position of a woman in the days of ignorance. They were deprived of their various rights for which they were entitled as a human being. Among the rights which were not enjoyed by them, was the right to get dower from their husbands. As among the primitive people, various methods of securing wives were prevalent in the past.¹ The most common method was "marriage by purchase." The husband was required to pay the price of the bride to her father, brother or other relative, whosoever may be guardian of the girl and in the case of "marriage by service"; the husband would serve the father of the bride with his service. In consideration of the service the father of the girl gave, his daughter to his would be son-in-law. Marriage by capture was also found at that time. These were the devices by which women were deprived of their rights of dower.

Sir Abdur Rahim says that-

"in the regular form of marriage the fixing of Mahr or dower for the benefit of the wife was in vague form among the Pre-Islamic Arab society. It forms part of the marriage but in some cases the guardian of the girls used to take dower himself. But at the time of Prophet

1. Willystin Goodsell: A history of Marriage and Family, p. 23 (1947)

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Mohammad (P.B.U.H) dower was regarded as a principal term of marriage contract. Its payment in the event of divorce or death of the husband was enforced by the voice of the public opinion or by the power of the woman's relative unless it has been paid at the time of marriage".²

With the advent of Islam, it removed the devices, which were prevalent in the days of ignorance to deprive the women from their rights of dower. It was made necessary to pay dower to a woman.

Quran declares:

"And give the woman (on marriage) their dower, as a free gift, but if they off, their own goods pleasure, remit any part of it, take it and enjoy it with right good cheer".³

There is also a tradition on this point by which it becomes clear that *Mahr* was made necessary for every marriage. According to the tradition in Bukhari "*the Mahr is an essential condition for the legality of marriage*".⁴

Thus, in this way *Mahr* was made essential for every marriage under Islam to safeguard the right of a wife. Even a small portion of a money may be fixed as *Mahr* and can be given by the husband to his wife. Once Prophet Mohammad (P.B.U.H.) allowed a marriage with

2. Abdur Rahim: Mohammadan Jurisprudence, p. 8 (1958)

3. Al-Quran, IV:4

4. E.J. Brill's: First Encyclopedia of Islam 137 (1937).

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

only a poor man who did not possess even an iron ring, giving his wife instruction in Quran as *Mahr*.⁵

The concept of dower is also found in other religions such as that of Jews as well as in the Roman law. The Jewish Law with regard to dower is that, 'a marriage without consideration is invalid.' The Roman law also provides for *Mahr* to the wife. Some jurists compare the Islamic concept of dower with Roman concept of dower and say that it is similar to the Roman doctrine. But in reality it is not so, because in Roman doctrine the payment of dower is voluntary whereas it is absolutely obligatory under Islamic law. Ameer Ali⁶ also says that the difference between the two is that under the Roman law it is not obligatory but depends upon the will of the husband to pay it or not where as under the Islamic law its payment is absolutely necessary.

Thus under Islamic law proprietary financial interest is the basic characteristics of dower, because the real object of dower is financial gain. Allah has said⁷:

"Also (prohibited are) Women already married. Except those whom your right hands possess: Thus, hath Allah ordained (Prohibition) against you: Except for these, all others Are lawful, provided Ye seek (them in marriage) with gifts from your property. Desiring chastity,

5. Ibid.

6. Ameer Ali: Mohammadan Law, 450 (1982).

7. Al Quran IV: 24.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

not fornication. Give them their dowry for the enjoyment you have of them as a duty, but if after a dower is prescribed ye agree mutually (to vary it), there is no blame on you, And Allah is all knowing All-wise".

Dower, in fact, is the name of that financial gain that accrues in marriage to woman in lieu of the pleasure to be enjoyed of her, though the marriage be either valid or irregular, on even cohabitation be in doubt.⁸

It was held by the Peshawar High Court in the case of *Zarina Qaiser Vs. Arbab Wali Mohammad* that "*Mahr is a sum of money on other property which the wife is entitled to receive from the husband in consideration of marriage.*"

Dower: Secular Understanding Meaning and Nature

Islam ordains that it is mandatory for the husband to pay his wife as a gift spontaneous popularly known as *Mahr*, merely because marriage has taken place between the two. It has a solid Quranic base confirmed by the Sunnah of the Prophet (S.A.W). But there exists a great deal of conflict and confusion in various writings about *Mahr* which seem to fail in giving a clear understanding of its concept, social significance and the rationale behind its legal enforceability. In order to understand the real spirit behind the concept of *Mahr* a macro level

8. Al-Jazari, Abdur Rahman: *Kitab al-Fiqh' alal Madh a hib Al-Arabah*, Cairo, Vol. IV p. 94.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

etymological survey of *Mahr* is most requisite. Without such a survey it would be impossible to find a basis for marking the magnitude and measuring the parameters of this Islamic Institution.

The expression *Mahr* is of multiple usage and connotation. *Mahr* as a noun with Arabic origins stands for what becomes due as a gift by the husband to the wife on marriage. *Mahur* (pl. of *Mahr*) is also used for 'marriage-portion' or a gift to the wife because of the fact of marriage.⁹

Francis Johnson describes *Mahr* as follows:

*Mahr indicates contracting, fixing of Mahr, paying of Mahr or making settlement on wife, and excelling in art or profession. It also means 'going on the right way', e.g. 'Lam taatah hazel amral maharatah' – you have not gone the right way in this matter.*¹⁰

In its broader perspective *Mahr* includes -

- i) something lovable, or thing having reference to love as a bone in the upper part of the breast, joints of the breast, or gristles of the ribs; or something presentable as gift like a pearl; and
- ii) doing of something in the right way and with skill.¹¹

Mahr (origin: Persian) means kindness, favour, love, affection (noun feminine) and *Sun* (noun masculine).¹²

a) Quranic Phraseology:

The Quran makes the ordainment of *Mahr* in its own peculiar terms. It nowhere uses the word *Mahr*. Term *Mahr* has been used by

9. Lisan al Arabi, Meaning of *Mahr*.

10. Francis Johnson, Dictionary of Persian, Arabic and English (London), 1852

11. Ibid.

12. Molvi Feroz al-Din, Feroz al-Lugat, Meaning of the term '*Mahr*'.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Muffassirin (exegetical commentators), *Fuqaha* (Jurists) and by the majority of Muslims all over the world. The use of the term *Mahr* in ahadith is found to be very rare. The question is- Why the term *Mahr* is widely used in fiqh when it has not been used in the Quran. This is probably due to the common use of this term in pre-Islamic Arabia. However, it is to be noted, that the term *Mahr* in Islamic fiqh does not have the same meaning and connotation as it had in the pre-Islamic period. The term *Mahr* has undergone complete metamorphosis after taking on the colour from Quranic terms as will be evident from the following exposition of the relevant expressions. This is a strong instance of social transformation by Islam. Islam does not blindly disapprove or abolish an institution or system by way of reaction but does it sanely, bringing about modifications in social institutions. In this process the evil becomes clearly visible, discernible and, of course, extinct. This protects the good and abolishes the evil, not which is otherwise, possible in a mere reactionary process. For *Mahr* the Quran uses the following terms:

- i) Saduqah (Saduqati hinna)¹³
- ii) Ajr (Ajura-hunna)¹⁴

13. The Quran, 4:4, Maulana Abdul Rashid Nu'mani, Lughat al-Quran Vol. IV, p. 14, 1958 AD/1378 A.H.

14. The Quran, IV:24, 25; V:5; XXXIII:50; LX:10.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

iii) Fariezah (Lahunna'fariezah)¹⁵

All the Muffassirin in their versions, have described these terms as *Mahr*. Short texts and relevant excerpts from Tafasir are given below:

i) **Saduqah:**

And give the women (on marriage) their 'dower'¹⁶ as a free gift

(Abdullah Yusuf Ali)¹⁷

Give Mahr to your wives with a willing heart.

(Ibh Kathir)¹⁸

Ibh Kathir also reports Abu Saleh (RA) saying:

"Earlier people took the *Mahr* of their daughters themselves but this verse was revealed to stop them enjoining its actual delivery to the wife herself".¹⁹

This shows that the term *Saduqat* stands for *Mahr*.

"And you give Mahr to the women with a willing heart."

(Maulana Ashraf Ali Thanvi)²⁰

"And give Mahr to the women with a willing heart (considering it a obligatory)".

(Syed Abul A'la)²¹

"And give to the women on marriage 'Saduqatihinna' (Plural of Saduqat) with Fatah (S) and Dhamma (d), the saduqah meaning Mahr".

(Tafsir Rooh al M'ani)²²

15. The Quran, II:236, 237; IV:24; XXXV:50.

16. A Yusuf Ali, The Holy Quran, (English Translation) IV: 4; see the actual connotation of the term 'dower' below in this chapter.

17. Ibid.

18. Tafsir Ibn Kathir, 4:4.

19. Ibid.

20. Bayan al Quran, Surah al-Nisa:4.

21. Taffhim al-Quran Vol. I, Surah Al-Nisa:4.

22. Tafsir Rooh-al-Ma'ani, Vol. III, Part 4, P. 198 (Maktabah Imadadiya Multan, n.d.).

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Thus the Muffassirin gave, for saduqah used the common expression, *Mahr* and for term Saduqatihinna the mahurahunna (their *Mahr*).²³

ii) Ajr (pl. Ajur)

Give them their 'dowers' (at least) as prescribed.

(Abdullah Yusuf Ali)²⁴

Give them their settled Mahr.

(Ibn-Kathir)²⁵

So give them their Mahr which has been settled.

(Maulana Thanvi)²⁶

Discharge their Mahr as prescribed to be obligatory.

(Syed Abul A'la)²⁷

Give them their dowers according to what is reasonable.

(Abdullah Yusuf Ali)²⁸

And give their Mahr according to established order.

(Ibn Kathir)²⁹

And keep them giving Mahr in conformity with the established order.

(Maulana Thanvi)³⁰

-
23. All these excerpts are given here only to know the Quranic terms used for *Mahr* with established meaning from Mufasssirin. Full details about legal principles will be given at relevant places in the subsequent chapters of this work.
24. A. Yusuf Ali, *Op. Cit.* IV:24.
25. Tafsir Ibn Kathir, Surah IV:24.
26. Bayan al-Quran, Surah IV:24.
27. Taffhim al-Quran, Vol. 1, Surah IV:24.
28. A. Yusuf Ali *Op. Cit.* IV:25.
29. Tafhsir Ibn Kathir, Surah IV:25.
30. Bayan al-Quran, Vol. In Surah V:25.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

And discharge their Mahr in the reasonable way.

(Syed Abul A'la)³¹

When ye give them their dowers.

(Abdullah Yusuf Ali)³²

*Ye discharge their Mahr.....*³³

Ye give them their recompense, i.e. Mahr be given not merely as a condition but as an obligation.

(Maulana Thanvi)³⁴

After ye discharge their Mahr.

(Syed Abul A'la)³⁵

*To whom thou hast paid their 'dowers'.*³⁶

(Abdullah Yusuf Ali)

To whom ye have given their Mahr.

(Ibn Kathir)³⁷

To whom you have given their Mahr.

(Maulana Thanvi)³⁸

Whose Mahr ye have discharged.

(Syed Abul A'la)³⁹

*On payment of their 'dowers'.*⁴⁰

(Abdullah Yusuf Ali)

31. Taffhim al-Quran, Vol. I, Surah V:25.

32. A. Yusuf Ali, *Op. Cit.*, V:6.

33. Tafsir Ibn Kathir, Surah Maidah:5.

34. Bayan al-Quran, Surah Maidah:5.

35. Taffhim al-Quran, Surah Maidah:5.

36. A. Yusuf Ali, *Op. Cit.*, X, XXIII:50.

37. Tafsir Ibn Kathir, Surah al-Ahzab:50.

38. Bayan al-Quran, Vol. IV, Surah al-Ahzab:50.

39. Taffhim al-Quran, Vol. IV, Surah al-Ahzab:50.

40. A. Yusuf Ali, *Op. Cit.*, VI:10.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

After giving them their Mahr.

(Ibn Kathir)⁴¹

While ye defray their Mahr to them.

(Maulana Thanvi)⁴²

Provided ye pay their Mahr to them

(Syed Abul A'la)⁴³

iii) Fariezah

Or before the fixation of their 'dower'.

(Abdullah Yusuf Ali)⁴⁴

And without fixation of Mahr.

(Ibn Kathir)⁴⁵

And no Mahr has been fixed for them.

(Maulana Thanvi)⁴⁶

Or (before) Mahr has been fixed.

(Syed Abul A'la)⁴⁷

And ye have fixed their Mahr also

(Ibn Kathir)⁴⁸

And some Mahr had been fixed for them. ⁴⁹

(Maulana Thanvi)

But Mahr has been fixed.

(Syed Abul A'la)⁵⁰

-
41. Tafhsir Ibn Kathir, Surah Mumtahinah:10.
42. Bayan al-Quran, Vol. III, Surah Mumtahinah:10.
43. Tafhim al-Quran, Vol. V, Surah Mumtahinah:10.
44. A. Yusuf Ali, *Op. Cit.*, II:236.
45. Tafhsir Ibn Kathir, Surah Baqarah:236
46. Bayan al-Quran, Surah Baqarah:236.
47. Tafhim al-Quran, Vol. II, Surah Baqarah:236.
48. Tafhsir Ibn Kathir, Surah Baqarah:237.
49. Bayan al-Quran, Surah Baqarah:237.
50. Tafhim al-Quran, Surah Baqarah:237.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

b) Terms used in ahadith and other works (Excerpts)

Allah's Messenger manumitted Safiyyah and regarded her manumission as her Mahr.⁵¹

Allah's Messenger forbade al-shighar which means that somebody gets his daughter married to somebody else, and the latter gets his daughter married to the former without paying Mahr.⁵²

Have you got anything to pay her Mahr.⁵³

To marry (a lady to) a man for what he knows of the Quran (by heart) and without paying (and other thing as) Mahr.⁵⁴

To give Mahr in the form of material things.⁵⁵

When Abdur-Rehman bin Auf married an Ansari woman, the Prophet (S.A.W.), asked him; How much *Mahr* did you give her?⁵⁶

Thus in ahadith also, originally, the expression sadaquah is found to have been used abundantly but the commentators and the translators have used the common expression *Mahr*.

To have an appraisal of some other substitute terms the following excerpts from various works are reported:

Sadaq, Sadaqah, Nihlah, Ati iah and Uqr are all the names of *Mahr*. And Ajr, ala'iq, Habba and Fariezah are also called as *Mahr*.⁵⁷

51. Sahih Bukhari, Kitab al-Nikah, Chapter 14, No. 13 and Chapter 69 No. 98.

52. Id. Chapter 29, No. 47.

53. Id. Chapter 40, No. 66.

54. Id. Chapter 51.

55. Id. Chapter 52

56. Id. Chapter 69, No. 96

57. Maulana Khuram Ali and M. Ahsan Siddiqui, Gayat-al-Au'tar (Urdu Tr. Of Durr al-Mukhtar) at p.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Sadaqatun means only such a gift that invokes only the pleasure of Allah and not personal glorification. Al-Sadaqatu, al Sadqatu, al-Saduqatu, al-Sud qatu all have the same meaning. This also means *Mahr* given to the women on marriage.⁵⁸

The Quran has used the expression Saduqatun and Ujurun for *Mahr*.⁵⁹ *Mahr*; is termed as: Persian kabin-e-zann, Ahmad Nagri, dasturul ulema, Arabic (i) al-nihlah (ii) al-sadaq (iii) al-uqr (iv) al-ajr (v) al-saduqah; al-alaiq al-habba and al-fariezah but only word *Mahr* is in common use.⁶⁰

c) Meaning of the terms relating to *Mahr* used in the Quran and ahadith

The meaning of the Quranic terms saduqah, nihlah, ajr and farieza is made clear by the following excerpts from the lugat and other works:

(i) Saduqah:

Saduqah is a derivative of 'Sadq', written by some as Sadk.

Following excerpts from the lugat helps to know its literal meaning.

58. Umar Ahmad Usmani, *Fiqh al Quran*; Vol. 1, p. 273 (delhi, 1984).

59. Id., p. 504.

60. Urdu Encyclopedia of Islam Vol. XXI, p. 885 (Punjab University, Lahore, 1407/1987); al-Bahr al-Raiq Commentary on Kanz al-Daqa'ik, 3:152; al-Mughni, 6:679; Lisanul Arabi.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Sadk; speaking the truth, being true, just, honest, upright, Sidk, truth, veracity, sincerity, praise.⁶¹

Sudaka, (p. Sadiq) True, just sincere friend). Sudkat, Sudakat and Sudukat, Sudkat, marriage portion, Sadaq or sidk (pl. Sudk) and Suduk. A marriage settlement, a portion which the husband engages to give to his future wife. Sidak cultivating friendship, sincere and mutual friendship.⁶²

Saduqat (pl. of saduqah) means *Mahr*. Sidq: Truth, veracity, rectitude, honesty; uprightness, truthfulness, good name Sadaqa is the origin of Yasduqa which means speaking the truth and manifestation of truth by deeds.⁶³

Sidq (1) Truth; (2) Correctness, rectitude; good fortune, felicity, auspiciousness e.g.

"And give the good news to the Believers that they have before their Lord the Lofty rank of truth".⁶⁴

According to Imam Raghīb Isfahani⁶⁵ Sidq and Kizb both are, in reality, utterances-pat or future-promise or no promise. These give

61. Supra Note 2 at p. 42

62. Ibid; Some other uses of this word are outside the scope of this work.

63. Maulana M. Abdul Rashid Naumani, *Lugat al-Quran*, Vol. IV, p. 17 (Darul Mufasssirin, Delhi 1378/1958).

64. Mirza Abul Fazl, *Gharib al-Quran Fe Lugat al-Furqan* (Allahabad, 1925).

65. Imam Raghīb Isfahani, *Mufradatul Quran* (The obscure words of the Quran); Supra Note 65.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

some information. Directly these are not used in any other genre of literature. Their use is made like this:

Whose word is more 'truthful' than that of Allah

He was 'true' to his word.

Also Sidq means conscience (or, inner moral guide). It is sometimes used to express one's degree of commitment towards an object, such as Sadqa fi-al Qatal (He has done all that he was supposed to do in the battlefield).⁶⁶ That is Sadaqah includes unity of thought and action and it is the expression of situation as per the reality.⁶⁷ The word Sadq, therefore, applies to every such object as is in appearance as well as in reality; graceful, honored, exalted. It is said:⁶⁸

Honourable body;

And

Honourable rank, position

iii) Nihlah:

Nahlat, a bee, nihlat or nuhlat, an appointment of a marriage portion, a gift, of one's own accord, voluntarily.⁶⁹ Granting to a woman her marriage gift voluntarily.⁷⁰

66. Ibid.

67. Urdu Encyclopedia of Islam, Vol. XII, p. 93.

68. Qazi Zain-ul-Abidin-Sajjad Meeruti, Qamus-al-Quran, (Meerut, 1381 AH).

69. Supra Note 2 at p. 42

70. Ibid.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Al-nihlatan and al-nuhlata means that gift which is given without any compensation or consideration....Al-ata'-bilaiwz, (gift without any consideration).⁷¹

Tajul'Urus and Ibn Faras have written the same meaning of al-nahlu. This indicates a 'gift'- spontaneous, with no idea of compensation or consideration. Imam Raghib has written that (al-nihlatu is a derivative of (nahlum)). That is, as a honey bee gives without any consideration, the useful and sweet honey, it is in the same manner that nihlatun is that pleasant and sweet gift given to women willingly and gladly without any idea of compensation.⁷²

iii) Ajr

Ajr is actually a word of Akkadian language which has been assimilated by Arabic language. This is used in two senses. Both the uses of the term are found in the Quran: ⁷³

- i) It is used for expressing the reward that will be given for virtuous deeds in the hereafter; but truly the ajr', i.e. reward of the hereafter will be greater, if they only realize (this);⁷⁴
- ii) During the time of the Prophet, (P.B.U.H.) it was used to mean 'recompense'. In the Quran it is used for recompense as well as *Mahr*, e.g.

*If they suckle your (offspring) give them their recompense.*⁷⁵

*And give them their Mahr.*⁷⁶

71. Supra Note 67 at p. 54

72. Ibid.

73. Supra Note 66; Urdu Encyclopedia of Islam, Vol. I, p. 100, 1384/1964.

74. The Quran, XVI:41.

75. The Quran, LXV:5

76. The Quran IV:25.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

The correct use of the term 'ajr' is explained by the following lines:

Ujurun (pl. of ajrun), according to Ibn Faras basically means 'joining of a broken bone.' It is for this reason that the remuneration given to a labourer is called ajrun. It heals up the wounds of labour and joins the broken bones. The gift or *Mahr* given to the women on marriage is called ajr because it is given to the wife to bear with some pleasantries the agony of separation from parental home which every woman suffers and to face the disquietude of usual apprehensions about the new matrimonial life. She is tied up to the new home with a gift spontaneous so that she becomes gladly familiar with the new life.⁷⁷

Francis Johnson also makes a mention of the meaning of the word 'ajr' as:

Restoring, healing (a broken or dislocated joint). Being this restored. Honourable mention.⁷⁸

iv) **Fariezah means:**

Mahr, al-Sadaq (as said by Ibn Abbas);⁷⁹ ordainment; an ordinance of Allah; an indispensable religious or legal duty; a fixed portion; *Mahr* of women.⁸⁰

77. Supra Note 58 at p. 52

78. Supra Note 2 at p. 42

79. Supra Note 66 at p. 54

80. Maulan Syed Abdul Rahim Jalali, *Lugat al-Quran* (1376/1957); Supra Note 2.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

It is for this reason that the rule has been established that *Mahr* is obligatory for every marriage even if no mention of it is made at the time of marriage.⁸¹

2. Nature of *Mahr* as an Islamic Legal Concept

a) **Some juristic explanations:** Before making an attempt to define the term *Mahr* it is necessary to examine the important expositions from various writers of Muslim law concerning the meaning and significance of *Mahr*. It will be most advisable to prepare an actual record of the excerpts from these writers and authorities. It, however, cannot be gainsaid that these explanations fail to communicate in full, the spirit behind the divine expression 'gift spontaneous' used for *Mahr* in the Quran.

Hedaya: The payment of *Mahr* is enjoined by the law, merely as a token of respect for its object (the woman) wherefore the mention of it is not absolutely essential to the validity of a marriage and for the same reason a marriage is also valid, although the man were to engage in the contract on the special condition that there should be no *Mahr*.⁸²

81. Supra Note 60 at p. 52

82. Hedaya, vol. I, Book II, Chapter III, p. 44.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Inayah: (*Mahr* is) the property which is incumbent on a husband whether by reason of being mentioned in the contract of marriage, or by virtue of the contract itself, opposed to the usufruct of the wife's person.⁸³

Kifayah: *Mahr* is not the exchange or consideration given by the man to woman for entering into the contract.⁸⁴

Baillie: (*Maahr*) is defined to be the property which is incumbent on a husband, either by reason of its being named in the contract of marriage or by virtue of contract itself, as opposed to the usufruct of the wife's person; and it is known by several names, as *Mahr*, *Sudak*, *Nuhlah* and *Akr*... [*Mahr*] is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect of the contract, imposed by the law on the husband, as a token of respect for its object, the woman.⁸⁵

It appears that Neil B.E. Baillie has given his definition of *Mahr* on the basis of the texts of *Hadaya*, *Inayah* and *Kifaya*.

Abdur Rahim: *Mahr*....is either a sum of money or some other form of property to which the wife becomes entitled by marriage. It is not a

83. Inayah, Vol. II, 52.

84. Kifayah, Vol. II, 59.

85. Baillie, A digest of Mohammadan Law, Vol. I, p. 91 (Lahore, 1865).

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

consideration proceeding from the husband for the contract of marriage, but it is an obligation imposed by the law on the husband as a mark of respect for the wife as is evident from the fact that the non-specification of '*Mahr*' at the time of marriage does not affect the validity of marriage.⁸⁶

Al-Fiqh Al-Mazahib Al-Arba'ah: Since *Mahr* is obligatory which is to be given by the husband to the wife on marriage; on this basis, Shafi defines it as that mal which validates the conjugal rights to man. But other jurists have defined *Mahr* as that mal which is given to the woman in consideration of the benefits taken from her. It means only that mal which is given in case of a proper and genuine marriage.⁸⁷

Urdu Encyclopedia of Islam: The proper amount of money or equivalent property that is binding on man as '*Qawwam*' to be given to woman on marriage, besides usual maintenance, is called *Mahr*. Though some jurists have described it as a consideration for obtaining bodily benefits by the husband but its meaning and connotation is wider than that. For example, half of the fixed *Mahr*, desirably whole of it, is

86. Abdul Rahim, *Mohammadan Jurisprudence*, p. 334 (madras, 1911).

87. *Al-Fiqh al-Mazahib al-Arbah*, Vol. IV, pp. 94-96: *Urdu Encyclopedia of Islam*, Vol. XXI, p. 886 (P.U. Lahore, 1406/1987).

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

payable to the wife even if the marriage is dissolved before consummation.⁸⁸

Encyclopedia of Islam: *Mahr* is in Muslim law the gift which the bridegroom has to give to the bride when the contract of marriage is made....the 'Kuran' no longer contains the conception of the purchase of the wife and *Mahr* as the price, but the *Mahr* is in a way a reward, a legitimate compensation which the woman has to claim in all cases. The 'Kuran' thus demands a bridal gift for a legal marriage.⁸⁹

Joseph Schacht: [In Islamic law] there is no matrimonial; community of goods and no dot or marriage portion (dowry in the western sense). The wife has the right to the nuptial gift (*Mahr*) and to maintenance (*nafaka*). This gives her a strong position as against the husband.⁹⁰

Almaric Rumsey: '*Mahr*' in its general sense, is a sum of money, or other property, payable by a man to a woman on or after her marriage with him, as a consideration to allow him to have sexual intercourse with her. The husband on his side is entitled to the enjoyment of that for which he has bargained.⁹¹

88. Urdu Encyclopedia of Islam, pp. 885-86.

89. Encyclopedia of Islam, Vol. IV (Supplement) p. 137. In recent edition Vol. VI, p. 78 (Leiden London, 1991).

90. Joseph Schacht, An introduction to Islamic Law, p. 167, Hong Kong, 1982.

91. Almaric Rumsey, Mohammedan law, p. 345 (Lahore).

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Alhaji A.D. Ajijola: *Mahr* is an obligation imposed by the law on the husband, as a mark of respect for the wife...it is a safeguard against the husband's arbitrary power of divorce and is not an exchange or consideration given by the man for marriage contract because the contract only requires union of the parties.⁹²

Ameer Ali: In order to constitute a valid marriage, the Muslim law requires that there should always be a consideration moving from the husband in favor of the wife, for her sole and exclusive use and benefit. This consideration is called *Mahr* or *sadak* in legal treatises, and in common parlance *dain-Mahr* (*Mahr* debt).⁹³

Robertson Smith: In Islamic law, *Mahr* belongs absolutely to the wife...historically speaking, the idea of sale is latent in the law of *Mahr*.⁹⁴

David Pearl: *Mahr* is not a consideration for the contracting of marriage. The *Mahr* must be clearly seen as the effect of the contract of marriage rather than the price paid by the husband for acquiring various rights which accrue to him on marriage. *Mahr* is often discussed also in terms of a sum paid to the wife as a mark of respect to her. If, therefore, no

92. Alhaji A.D. Ajijola, *Introduction to Islamic law*, p. 154 (New Delhi, 1989).

93. Ameer Ali, *Mohammedan Law*, Vol. II, p. 432 (Delhi, 1985).

94. Robertson Smith, *Kinship and Marriage in Early Arabia*, p. 78, 79. Fyzee A.A.A., *Outlines of Mohammedan Law*, 4th ed., p. 13 (Oxford, 1974)

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Mahr is agreed upon by the parties, the contract of marriage and what is referred to by the expression "proper *Mahr*" created by the operation of law will become payable. The obligation to pay *Mahr* is an effect of the marriage, rather than an incident to it.⁹⁵

Maulana Abul A'la Maududi: Men are the protectors and maintainers of women....man by nature deserve to be the 'Qawwam' but apparently he gets this position in a return for the mal which he spends by way of *Mahr*.⁹⁶

Maulana Umar Ahmad Usmani: [*Mahr*] is that present or gift which is given to invoke the pleasure of Allah through fulfilling his orders. It is neither compensation for anything nor its object to show one's greatness or grace. *Mahr* is that present or gift which is given by man to woman without any idea of any kind of compensation.⁹⁷

Al-Syed Sabiq: Making *Mahr* obligatory for women is symbolic of the conferment of property rights upon women by Islam after Jahiliyah period. That purifies the soul of the woman and she becomes satisfied with the proctorship of the man.⁹⁸

95. David Pearl, A textbook on Muslim Personnel Law, 2nd ed., p. 60 (New Hampshire, USA, 1987)

96. Maulana Abul Ala Maududi, Haquq al-Zawjain, 3rd ed., pp. 26-27, (Delhi, 1989)

97. Maulana Umar Ahmed Usmani, Fiqh al-Quran, Vol. I, pp. 504-505, (Delhi, 1984).

98. Al-Syed Sabiq, Fiqh-al Sunnah, Vol. II, p. 155, (Beirut Lebanon, 1389/1968).

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Hazrat Ali: [*Mahr*] is an absolute gift (*nihla*) to the wife without any condition.⁹⁹

b) Excerpts from Judgments

- i) *Mahr* under the Muslim law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no '*Mahr*' is expressly fixed or mentioned at the marriage ceremony, the law confers the right of *Mahr* upon the wife as a necessary effect of marriage. The *Mahr* of Muslim law bears a strong resemblance to the donation propter nuptials of the Romans which has subsisted in the English law under the name of marriage settlement. In this sense and in no other *Mahr* under Muslim law be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic text books of Muslim law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law and sale is the typical contract which Muslim jurists are accustomed to refer to in illustrating the incidents of other contracts by analogy.¹⁰⁰
- ii) *Mahr* is an essential incident under the Muslim law to the status of marriage, to such an extent this is so that when it is unspecified at the time the marriage is contracted, the law

99. Fayzee, A.A.A., *Compendium of Fatimid Law*, p. 15 (Shimla, 1969).

100. Mahmood, J's dictum in *Abdul Kadir Vs. Salima* (1889) ILR 8 ALL 149.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

declares that it must be adjudged on definite principles.
Regarded as a consideration for marriage....¹⁰¹

- iii) What is being sought to be enforced here is a contract entered into in contemplation of, by reason of, and ... as has been said in at least one decided case, though some doubt is to be very accurate, in consideration of marriage...¹⁰²
- iv) [*Mahr*] is "a mark of respect" to the wife.¹⁰³
- v) A right which comes into existence with the marriage contract itself except that in case the *Mahr* is deferred its enforcement is held in abeyance till a certain event, i.e. dissolution of marriage by death or divorce occurs. ¹⁰⁴
- vi) The marriage under the Muslim law is a civil contract and is like a contract of sale. Sale is a transfer of property for a price. In the contract of marriage the wife is the property and the *Mahr* is the price.¹⁰⁵
- vii) The marriage cannot be regarded as purely a sale of the person of the wife in consideration for the payment of *Mahr*.¹⁰⁶
- viii) It is not correct to say that the right to claim prompt *Mahr* does not precede cohabitation and comes into existence along with it.¹⁰⁷

101. *Hamira Bibi Vs. Zubaida Bibi* 1915/1643 ILR IA 294, per Lord Parker. The expression 'Mohammedan Law' is not islamically correct. It must be read as Islamic law.

102. *Shahnaz Vs. Rizwan*, 1965, I Q.B. 390 per winn, J.

103. *Zarina Quisha Vs. Arab Wali Mohd.*, 1976, PLD Pesh 128.

104. *Siddique Vs. family Judge Court III*, Karachi, 1980, PLD Karachi 477.

105. *Saburannessa Vs. Sabdu Sheikh*, AIR 1934 Cal 693.

106. *Anis Begum Vs. Muhammad Istafa* (193) 55 All 743.

107. *Mt. Nasra Begum v. Rizwan Ali*, AIR 1980 All 113.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

ix) Under Muslim law *Mahr* is not the exchange or consideration, as understood in the technical sense in the contract Act, given by the man to the woman for entering into the contract, but an effect of the contract imposed by the law on the husband as a token of respect for its subject, the woman.¹⁰⁸

x) The fact is that *Mahr* is neither 'consideration' nor 'dowry'. It has a unique position of its own.¹⁰⁹

c) Legislative definition

Of all the modern legislations on Muslim family laws, the Moroccan Code of Personal Status, 1958 enjoys the distinction of giving a concise and comprehensive definition of *Mahr* which bears the quality of touching the Divine wisdom. It reads:

*"Mahr" means any property given by husband to the wife representing his intention to have a family life based on mutual affection and company.*¹¹⁰

d) An analysis of these concepts of *Mahr*

The above conceptualization of *Mahr* boils down to the following assertions:

i) *Mahr* is a token of respect for woman.

108. *Mt. Fatima Bibi v. Lall Din* AIR 1937 Lah, 345.

109. Tahir Mahmood, *The Muslim Law of India*, p. 71 (Allahabad, 1980); This has reference to the conflicting views from judiciary.

110. Article 16, Moroccan Code of Personal Status, 1958.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

- ii) *Mahr* is incumbent on the husband by virtue of the contract itself. It is an effect of the marriage.
- iii) *Mahr* is a symbol of conferment of property rights on woman by Islam.
- iv) *Mahr* is an essential incident to the status of marriage.
- v) *Mahr*, which is mal spent on wife by the husband, apparently puts him in the position of Qawwan (protector, friend).
- vi) *Mahr* is a 'consideration' for the marriage given by the husband to the wife.
- vii) *Mahr* is a safe-guard against the husband's power to unilateral divorce.
- viii) *Mahr* is a measure to strengthen the position of wife against the husband.

On the basis of above juristic expressions, when each taken separately, we find lack of comprehensiveness coupled with diversity in approach and contradiction in terms. It is probably because of this situation that Tahir Mahmood writes:

Unfortunately, the Islamic concept of *Mahr* has been widely misunderstood. Those who are obsessed with contractual element in the Muslim concept of marriage regard it as 'consideration' and those who are more familiar with 'dowry' confuse it with the same. The fact is that

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Mahr is neither consideration nor 'dowry' it has a unique position of its own.¹¹¹

An appropriate definition of *Mahr* can be evolved only after a cumulative consideration of the following facts which may be called testing facts:

- i) Islam recognizes the property rights of woman and each woman retains her individual legal existence even during marriage, which can be symbolized by putting some property under her possession by way of *Mahr* at the time of marriage.
- ii) Islam demands that the husband must be careful about the matrimonial rights of the wife and his feelings about her honour and dignity must be conspicuous by actions (like payment of *Mahr*).
- iii) Islam desires that the husband must win the love and cooperation of the wife with the hope of reciprocity and make a symbolic representation of it.
- iv) Islam requires that something must be done at the time of marriage which can bring the spouses out of the perplexity of having joined a new phase of life and apprehensions about married life.¹¹²

111. Supra Note 109 at p.

112. Dr. M. Afzal Wani, the Islamic Institution of *Mahr*, p. 17.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

In view of these facts the most appropriate definition of *Mahr* is found in the Quran itself, it is a 'gift-spontaneous', that is a gift given with a willing heart.

And give to the woman their *Mahr* as a 'gift spontaneous'.¹¹³

The representation of a 'gift spontaneous' to the wife implies not only the recognition of her economic rights and equal legal status but raises her position socially to be treated as a source of blessing. Therefore, the term 'gift' qualified by the expression 'spontaneous' represents the true nature of *Mahr* as is manifested by the above mentioned 'testing facts'.

3. Socio-Legal Significance of *Mahr* in the Islamic Society

In order to understand any Islamic concept in its true sense and to comprehend the nature of any Islamic Institution in its real perspective, resort must, primarily, be had to the basic source of guidance, that is, the Quran and it's over all dispositions. Anything prohibited, permitted or enjoined by Islam must be read with its Quranic propensity and inclination. Without such a reference, Error is likely to occur and the confusion is certain to precipitate.

113. The Quran, IV:4.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Thus, the Quranic terms *saduqah*, *nihlah* and *ajr* show that *Mahr* is a gift or present from the husband to the wife with the purpose of producing maximum spousal cohesion and its presentation aims at stimulating co-operative living between the spouses. It inculcates responsibility and invokes reciprocity and fair dealing. *Mahr* as a gift spontaneous shows the nearness of hearts between the spouses. It is a symbol of high matrimonial morality, truthfulness, earnestness, affection and mutual; trust and confidence between the spouses. *Mahr*, if not paid by the husband when he is able to pay it and if demanded by the wife when she know that the husband is not at that time able to pay it indicates a breach in the spousal relationship.

The most natural way of developing good relationship is offering a gift with a willing heart. Its value is not important, but the way it is offered is significant. It is not primarily a monetary benefit to be conferred upon the donee. Therefore, the Quran directs the man to solicit the hand of the woman with *Mahr*, with all humility and solicitous approach, as she is the virtue, the potential and the garment of the man.¹¹⁴

114. The Quran VII:20.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Mahr is not a part of the contract of marriage. As an effect of the marriage it is a post ceremonial measure. It has a definite role to play in accordance with Divine Wisdom, that is, the establishment of the sweet home with cooperative spouses. Mutual love and affection is the basic arch of every family (the basic unit of Muslim Society) and *Mahr* is the key stone of that arch. In domestic relationship the Quran has laid down great emphasis on mutual love, affection, trust and confidence. It says:

*And of his signs is that He created for you of yourselves, spouses that you might repose in them and He has set between you mawaddah (love) and rahmah (mercy); Surely in that there are the signs for the people who think.*¹¹⁵

*They are your garments and you are in their garments.*¹¹⁶

*O'children of Adam we have bestowed upon you the garments to cover your shame, and to be an adornment to you and the garment of righteous, that is the best....*¹¹⁷

*And live with them (women) with kindness and equity.....*¹¹⁸

The Prophet (S.A.W) has said:

*I command you to take care of the woman in good manner....*¹¹⁹

115. The Quran XXX:21.

116. The Quran II:187.

117. The Quran IV:26.

118. The Quran, IV:19.

119. Sahih Bukhari, Kitab al-Nikah, Chpater 80.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

Every one of you is a guardian and every one of you is responsible; a wife as the guardian of her husband's home and she is responsible.

*Beware, all of you are guardians and responsible.*¹²⁰

*From amongst the believers the person of perfect faith is one who is best in morals; and amongst you the best is one who is best to his wife.*¹²¹

*Of all humans actions, the one which pleases Allah most is the manifestation of love when made only for winning the pleasure of Allah.*¹²²

It is basically with this percept that the Quran has enjoined *Mahr* in the following words:

*And give to the woman Mahr as a gift spontaneous (a gift with willing heart).*¹²³

This view is further substantiated by the fact that Prophet (SAW) has even accepted 'teaching of the Quran to the wife' as *Mahr*. It creates love (*mawaddah*) and forgiveness (*rahmah*) among the spouses and cements the family-ties. The Moroccan legislature, while defining *Mahr*, has really clinched the point by saying:

Mahr is any property given by the husband to the wife representing his intention to have a family based on mutual affection and company.¹²⁴

120. Ibid.

121. Tirmidhi.

122. Abu Dawud

123. The Quran, IV:4.

124. Supra Note 110 at p.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

So *Mahr* is not merely an economic benefit to be conferred upon a woman but it has a greater social purpose.

In its broader perspective the obligation of *Mahr* does not only provide the bed-rock for a tranquillus home but also plays a role in creating just and chaste social order. Recognizing a just place for women in the society, Islam removed all possible interdictions from their conferring upon them the ownership rights and a right to legally independent existence. In Islam, the personality of the wife cannot be deemed to have merged into that of her husband on marriage. She can own property, can sue anybody including her husband and can be sued whenever necessary. *Mahr* as an absolute property of the wife is symbolic of her full fledged legal personality. Al-Syed al-Sabiq, the author of *Fiqh-al-Sunnah* has aptly brought to the fore the socio-legal significance of *Mahr* in the following terms:

One of the best honours that have been conferred upon women and the best veneration that has been given to them by Islam is that she was vested with the property rights. During the period of Jahiliyah she could not own even her person. Interdiction was to the extent that even the guardian would snatch her property rendering no possibility or chance for her to own something or to possess anything. Islam liberated

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

her from those heavy weights. This is symbolized by making *Mahr* obligatory for her and binding upon men...This purifies the soul of the women and cultivates trust in the proctorship of man.¹²⁵

Jurisprudentially, something, which is socially and morally important and on breach invites moral and social sanctions, is in cases of higher desirability made legally enforceable. Islamically *Mahr* has been enjoined as a measure for maintaining socio-marital equilibrium when anyone tries to mock at this Quranic directive he cannot escape, besides moral and social sanctions, the legal sanctions. It is in this context that *Mahr* has been made legally enforceable before qadi (an Islamic judge). The legal sanctions are invited for breaking the Quranic social norms and for causing disobedience to Allah. And the magnitude of the sanction is determined by the quantum of *Mahr* due to the wife. So, the qadi can ask the husband to deposit the amount of *Mahr* with him and handover the same to the aggrieved party.

From the above stated facts it becomes clear that *Mahr* has an apparent social, moral and legal significance. However, as a Divinely ordained Institution of Islamic law, *Mahr* may, at times, attain many

125. Supra Note 98 at p.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

more significant dimensions, especially economic and strategic to protect women from exploitation.

4. Some pre and non-Islamic concepts confused with *Mahr* Dower:

At common law, dower was the life interest of a widow in one-third of the legal estates in real property owned by her husband at any time during the marriage. Originally there were varieties such as dower of as *Ostium Ecclesiae* (at the church door) and dower ex assensu patris (by the heir with his father's consent) where immediately before the marriage the wife was endowed of specified lands; and sometimes land held in knight service was exonerated from dower; by the widow's taking dower de la pelvis beale (of the most fair) of her husband socage land. But by the sixteenth century these forms were of little importance compared with dower at common law, or subject to local customs under which dower might extend to a quarter, a half or even a whole of the land. Except where the wife had been endowed of specific lands, she was entitled to have her land assigned 'by metes and bounds' by the heir with her quarantine: that is, the 40 days during which Magna Carta (1215) permitted her to remain in the husband's house after his death.¹²⁶

126. Encyclopedia Britannica, Vol. p. 616 (1970).

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

The right to dower might be barred by the wife before marriage accepting a jointure (a life estate in specified lands) in lieu of dower or by the complicated uses to bar dower invented in the 18th century. By the Dower Act, 1933, dower in Great Britain was restricted to reality still owed by the husband at his death and not devised by his will, and it could also be barred by a declaration in his will or by deed. Dower thus ceased to be a nuisance to conveyancers. As a small measure of compensation to widows, the Act extended dower to equitable interests.¹²⁷

The administration of Estates Act., 1925 , abolished dower. The modern tendency, wherever in common-law jurisdictions the dower continues, is either to abolish or to replace it by other less arbitrary means for providing for widows.¹²⁸

In the United States, no states had enacted statutes to the contrary, dower continues as at common-law. Some statutes, in most of the states have greatly modified the practices of dower; or substituted a different right or practice for it in the forms like a certain portion of the husband's property, or of the community property of both or of the life

127. Ibid.

128. Ibid.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

estate in portion of his reality.¹²⁹ The subject, therefore, in common law has greater reference to alimony rather than *Mahr*.

The probable cause for the use of the term dower for *Mahr* can be found in the fact that mostly the Muslims since long have not been giving *Mahr* to the wives at the time of marriage leaving their claims un-met during the course of the marriage. The unsatisfied claims may be, therefore, been usually launched by women or their representatives after the dissolution of the marriage by divorce or death. It is for this reason that the case on *Mahr*, which for the last two centuries have come before the courts involve, with rare exceptions, the question regarding widow's rights on *Mahr*. Thus, the western writers and judges, being not well versed with the real concept of *Mahr*, have adopted the term dower for *Mahr* taking it merely a widow's claim on deceased husband's estate.

Dowry:

The custom of giving dowry is not part of Islam, although seems to be on the increase among several Muslims cultures, notify those of Indian, Pakistani and Bangladeshi origin. In fact, dowry is another expression which is being confused with *Mahr*. Even the Encyclopaedia

129. Ibid.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

of Seerat¹³⁰ has used term 'dowry' for *Mahr*. The term dowry denotes the property. Whether real or personal, that a wife brings to her husband on marriage. In English law, until the enactment of the Married Women's Property Act, 1870 the wife's property passed in law absolutely to the husband. The rigour of this rule was modified by the application of the rules of equity to the provisions of settlements by the husband, or by the wife or by both, or by persons (such as the parents of either) interested in their welfare and while the legal estate was vested in the trustee of the settlement, the beneficial interest in the property included in the settlement vested as provided by the terms of the deed. Thus while in law a married woman would own no property, the position in equity was quite different. With the passage of Married Women's property Act, 1870, marriage settlements were no longer necessary for preserving the wife's title to her own property.¹³¹

Again the term, dowry is not a word that has all the technical connotations and implications of the French dot which has its roots in Roman Law. Among the Athenians and the Romans the woman, of course, brought the dowry and Code Napoleon (Article 1540) attached

130. Encyclopedia of Seerat, Vol. V, p. 475 (London)

131. Id., at p. 619.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

the same character to French dot.¹³² But in countries like France, where, even if Roman law remained the basis of the law of the country and was revived as such; the husband's rights in relation to the dot were not unlimited and the wife could take legal steps to protect the property which she had brought in the community of goods.¹³³ The French dot is analogous to Indian Jahez that has now taken shape of a social evil. *Mahr* is different from these altogether.

Under Hindu Law also the woman, before she was given the statutory protection, was having no legal personality of her own and on marriage her personality was being said to have merged into that of her husband. So the wife was virtually owned by the husband along with her property, if any. Presently even if the woman enjoys, under the statutory law, some independent existence but the husband in his 'earlier mood' continues to demand property from the wife in the shape of dowry. The present hike in dowry -deaths is an evidence of that fact.

In India legislations have been made prohibiting the practices of dowry. These anti-dowry legislations, however, exempt *Mahr* from their application recognizing it as a separate institution under Islamic law.

132. Supra Note 93 at p.

133. Supra Note 131 at p.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

This becomes clear from the definition of dowry given in section 2 of the India Dowry Prohibition At, 1961 which read as follows:

“dowry” means any property or valuable security given or agreed to be given either directly or indirectly

- a) by one party to a marriage to the other party to the marriage; or
- b) by the parents of either party to a marriage or by any other person to either party to marriage or to any other person; at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dowry or *Mahr* in the case of persons to whom the Muslim personnel Law (Shariat) Act applies.

Thus *Mahr* has been identified and recognized as distinct concept, not to be confused with dowry just for the reason that *Mahr* ha been rendered into English, of course, wrongly as ‘dower’. Indian legislature has played quite safe in this respect and to avoid any confusion both words *Mahr* and dower have been used in the above mentioned provisions as ‘dower’ or *Mahr*. So *Mahr* is not the same as dowry.

Stridhan

Stridhan under Hindu Law is not the same as *Mahr* in Islam. Stridhan literally means woman’s property. No exact definition of the

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

term is available in authorities on Hindu law. Gooroodas Banerjee has given vent to this feeling in the following words:

“majority of sages and commentators give neither an exact definition of Stridhan nor an exhaustive enumeration.”¹³⁴

In Yajnavalkya a definition of Stridhan has been attempted though this definition cannot be deemed to be final. It reads:

What was given to a woman by the father, mother, her husband or her brother or received by her at nuptial-fire or presented on her suppression and the like is denominated as women's property.¹³⁵

By using the words “and the like” in the definition Vijnaneshwara has enlarged the meaning of Stridhan. So this definition does not make the whole concept of stridhan clear and we do not have any other better definition available. But *Mahr* as an Islamic legal institution is a different one having its specific purpose and a definite place in its socio-legal set-up.

The difference between stridhan and *Mahr* will be more clear by making a perusal of the use of the term stridhan under Hindu law for denoting the following:¹³⁶

134. See Paras Diwan, *Modern Hindu Law*, p. 332 (1985).

135. Yajnavalkya, II, 143.

136. See *Supra* Note 134.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

- i) The gifts made to a woman during her maidenhood, coverture or widowhood by her parents and their relatives or by the husband and her relatives. These may be gifts *inter vivos* or by will.
- ii) The gifts *inter vivos* or by will made by strangers to a woman during her maidenhood, widowhood; before nuptial-fire or at bridal procession; during coverture by strangers under all schools of Hindu law but Mithila and Dayabhaga.
- iii) Property earned by self-exertion during maidenhood and widowhood; during covertures under all the schools of Hindu law other than Mithila and Bombay School; and
- iv) Property obtained by adverse possession according to all schools.

It may be pointed out that the position 1956 was that the gifts received from strangers during coverture were *stridhan* but these would during her life time remain under the husband's control. On his death these would become her full-fledged *stridhan*.

In a Kerala decision *stridhan* has been held to be covered by the expression 'dowry'.¹³⁷

Bride-Price

Some writers have used the expression 'bride-price' for *Mahr*. This concept is quite unislamic. This is callous use of the expression and an offensive way of taking undue liberties about sensitive matters. Unfortunately, misuse of terms is reported from some known writers

137. (1975) Kerala LT 386.

Chapter - II DOWER: A CONCEPTUAL ANALYSIS

also. The climax is found in the following line of a well circulated book which can be read only with exclamation.

The term 'bride-price' has been used because of its being closer to the original connotation of *Mahr* and, to avoid confusion, the term "dowry" has not been used.¹³⁸

To avoid one confusion, as is claimed by the author, a bigger confusion has been created by him. The author has not preferred to use the term *Mahr* as such to avoid every possible confusion. Such writings indicate misinformation and lack of intellectual courage.

The expression 'bride-price' indicates the payment by a husband to his father-in-law and the wife is, in effect, bought from her father. Among Hindus a form of marriage namely Asura, still prevalent among Sudra serves as an instance. In such a marriage the bridegroom receives a maiden after having given as much wealth as he can afford, to her kinsmen. Such a practice has no semblance with *Mahr*.

138. Majid Khadduri, *Law in the Middle East*, p. 141 (Washington, 1955).

CHAPTER-III

MARRIAGE AND INSTITUTION OF DOWER

- General Observation
- Instruction in religion
- Legislation in Muslim Countries
- Indian Legislation
- Dissolution of Muslim Marriage Act 1939
- Procedural Laws
- Case Law in the Subcontinent
- Impact of the Muslim Marriages Registration Act, 1980
- *Mahr* and aqd al-nikah: A legal norms
- Validity of Marriage without fixing dower
- Dower- a religious ordinance

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

General Observation:

In pre-Islamic Arabia marriage by capture, which was mainly due to the rule of exogamy; was the ancient form of securing a wife and it subsequently took the form of marriage by purchase. The specific conditions and terms were secured by the kins of the women to safeguard her interest and welfare. In ancient days the 'Saura' form of marriage (by purchase) was prevalent in India and it is still alleged to be practiced by the Indian Muslims in Punjab.¹

In the Muslim system, the concept of dower may historically be traced to be the bride's price in certain respects but it is not wholly so; prior to Islam, two kinds of marital gifts were prevalent. In a certain type of marriage, the so-called 'beena' marriage, where the husband visited the wife but did not bring her home, the wife was called 'Sadiqa' or female friend. In Islam 'Sadaq' simply means 'a dower' and is synonymous with *Mahr*.² But originally the two words were quite distinct; Sadaq is a gift to the wife and *Mahr* to the parents of the wife. The latter term belongs to the marriage of dominion, which is known as

-
1. Saxsena, K.P., *Muslim law As Administered in India and Pakistan* (ed. 3rd) 1954, p. 214.
 2. Roberston Smith, *Kinship* 93 quoted by Fyzee, A.A., *Outlines of Mohammedan Law* (4th ed.) p. 132.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

the baal marriage, where the wife's people part with her and have to be compensated.

Now *Mahr* in the baal form of Marriage was used by the Prophet (SAW) to ameliorate the position of the wife in Islam, and it was combined with sadaq, so that it became a settlement or a provision for the wife. Thus historically speaking, the idea of sale is latent in the law of *Mahr* (dower).³

In pre-Islamic days, it often happened that the Arabs, after despoiling their wives, turned them out adrift, helpless and without any means. So, it was made an essential condition to the validity of a marriage that the husband should settle on the wife a certain dower, which became her exclusive property. This ancient custom was often disregarded, as there was no organised system of law.⁴ Promulgation of Islam established this ancient custom and forbade unjust acts towards the fair sex, as is evident from the Quran:

"If you separate yourself from your wives, send them away with generosity, it is not permitted to you to appropriate the goods you have once given to them".⁵

3. Ibid.

4. Supra note 1, p. 215.

5. Quran V:4

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

In order to safeguard the economic position of woman after the marriage, Islam has made it legally obligatory on the husband to pay her a reasonable amount as dower. The amount is to be fixed on an agreement between the parties. The object is to strengthen the financial position of the wife so that she is not prevented, for the lack of money, from defending her rights. However, she is competent enough to decrease the dower in favour of the husband partially. Quranic provision also, in this regard says⁶:

"And give women their dower as a free gift, but if they themselves be pleased to give up to you a portion of it, then eat it with enjoyment and with wholesome result".

The following a hadith of the Prophet (SAW) stresses the importance attached to dower in Islam:

*"Ibn Umar reported that the Prophet (SAW) of Allah forbade shishar and shishar is a means giving his daughter in marriage on condition that another would give his daughter in marriage to him and that there should be no dower between them."*⁷

Jabar reported that the Messenger of Allah said:

*"Whose gives two handruds of barley or dates as dower of his wife has rendered (her) lawful."*⁸

6. Quran IV:4

7. Quoted by M.M. Siddique in Women in Islam, Supra note 2, p. 46.

8. Abu Dawood, tr. By Nishar Ahmad, Fundamental Teachings of Quran and Hadith, p. 62.

Chapter – III* **MARRIAGE AND INSTITUTION OF DOWER*

The following hadith of the Prophet (SAW) also stresses upon the importance attached to dower in Islam; the hadith was collected by Abu Dawood and Hasan:⁹

Alamah b. Masud reported that he was asked about a man who married a woman but did not fix any dower for her, nor had he any intercourse with her till he died. Ibn Mas'ud told her: Fix the equivalent dower of his woman, neither less nor more. And there is a period of waiting for her and there is her share of inheritance for her (from her husband's property), then Ma'qal b. Sinan got up and said: 'The Messenger of Allah decreed in case of Bar wa'ah bint washiq (a woman belonging to us) just as you have decreed'.

Dower is an essential incident of the Muslim law of marriage, so much so that even if there is a stipulation on the part of the woman before marriage to forgo all her right to dower, or even if she agrees to marry without any dower, the stipulation or agreement will be invalid and ineffective and she would be entitled to customary dower. If there is no specification of dower in the marriage contract, the marriage will be held valid, and the law would adjudge it on a definite principle.¹⁰

9. Ibid.

10. *Hamira Bibi Vs. Subeda Bibi*, 24 IA 294.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

The amount of dower can be fixed at any time before or after marriage. It should never be supposed that the validity of the marriage is dependent upon the conferment of dower and when there is no consideration for the matrimonial contract, the marriage is valid.

Hedaya¹¹ says:

"A marriage is valid although no dower had been mentioned, because literally nikah signifies a contract of union which is fully accomplished by the performance of the marital rites."

Dower is obligatory as a mark of respect for the subject (Al-Mahal); therefore its mention is not essential to the validity of marriage. For the same reason, a marriage is valid, although the husband were to engage in the contract on the special condition that there should be no dower. Fatwa-i-Qadi Khan¹² says:

"Mahr is so necessary to the marriage that if it were not mentioned out the time of marriage, or in the contract, the law will presume it by virtue of the contract itself."

So, the settlement of dower is essential for a marriage but not for its validity.

Muslim jurists generally treat dower as a consideration for buza i.e. engagement of the private parts of a woman, and it cannot be

11. Hedaya, quoted by Saksena, Supra note 1, p. 216.

12. Fatawa-i-Qadi Khan, quoted by Saksena, Supra note 1, p. 216.

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

treated as a consideration for marriage. Sir Abdur Rahim has remarked¹³:

"Dower is not a consideration proceeding from the husband for the contract of marriage, but is an obligation imposed by the Muslim law as a mark of respect for the wife".¹⁴

Baillie, in his Digest defines dower to be:

"The property which is incumbent on a husband, either by reason of its being named in the contract itself, as opposed to the usufruct of the wife's person...."

Dower is not the exchange or consideration given by the men to the women for entering into contract; but an effect of the contract imposed by the law on the husband as a token of respect for its subject, the woman".¹⁵

The Hedaya says:

"The payment of dower is enjoined by law as a token of respect for its object; the women".¹⁶

Maulvi M. Somee Ullah gives an equivalent of the Arabian expression in English to be a token of respect for the "mahal" which from term refers to buza and not the woman herself.

13. Abdur Rahim, Principles of Muhammadan Jurisprudence (1908), p. 334.

14. Baittie, quoted by Saksena, Supra Note 1, p. 214.

15. Fatima Bibi Vs. Lal Din, 1937, Lah. 345.

16. Grandy: Hedaya, tr. By Hamilton, p. 44, Supra note 1.

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

Regarding the amount of dower to be fixed, Islam has given a wide latitude to men and women. It can be as low as possible or on high as the parties may desire. Ibn Majah and Tirmidhi report from 'Amir ibn Rabi'ah':

*"A woman belonging to the tribe of Banu Fazarah married a man for a pair of shoes. The Prophet (SAW) asked her whether she was really happy over that much dower. She replied in the affirmative, whereupon the Prophet (SAW) made no objection."*¹⁷

According to Abu al Jaf'ar (R), it was the opinion of 'Umar (R) the second Caliph that:

*Dowry should not be fixed at a very high rate, for if this had been a point of honour and pleasing in the sight of God, the Prophet (SAW) too would have acted accordingly, but he did not fix more than a hundred and twenty-five dirham for his wives and daughters."*¹⁸

Umar's(R) opinion was, however, challenged by a woman who said:

*"Umar, you have no right to impose which restrictions, because the Holy Quran says that men should not take anything from their wives if they intend to divorce them, even if they have given them heaps of gold. This shows that God allows even a very high rate of dower, Umar(R) replied her saying that she was right and that he had made a mistake himself."*¹⁹

The amount of dower may be fixed either before or at the time of marriage or after marriage, and can even be increased after marriage.

A contract of dower can be made by a father on behalf of his son, if the

17. Tirmidhi, Ibn Maja, Quoted by M.M. Siddiqi, Supra note 1, p. 47.

18. Tirmidhi, p. 132, Ibid.

19. Nail-al-Autar by Shaukari, p. 85, Ibid, p. 47.

***Chapter – III* MARRIAGE AND INSTITUTION OF DOWER**

latter is a minor. The wife may remit the whole or part of dower. Such remission is valid though made without consideration. If the dower is not paid, the wife and, after her death, her heirs may sue for it.²⁰

The real object of dower is to raise the wife from the position of a saleable object to that of a contracting party²¹ and to protect the wife against the arbitrary exercise of the power of divorce by the husband. Dower also compensates the women. It may be said that by giving the daughter half the share of a son, Islam has let down the position of women, but it should not be forgotten that a woman may also receive dower and property from her husband. Moreover, there is no obligation on a wife to sustain her husband economically, while the husband is under a legal obligation to provide for his wife. Thus her ostensible inequality is more than compensated and both sexes become equal on economic grounds.²²

When the right to the dower has once been vested in the women, she cannot be divested of it by any of her subsequent acts, such as her

20. Id. at p. 48.

21. M.H. Zafer, "Muslim Law- Some Conflict and Rationale", Aligarh Law Journal (Vol. VII, 1981), Aligarh p. 38.

22. Supra note 1, pp. 48-49.

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

apostasy or adultery or even if she commits suicide or is killed by her husband, in the last two cases, her heirs would be entitled to it.²³

Section 130, Transfer or Property Act applies as much to Muslim as to any other communities.²⁴

The Jewish law as regards to the dower is that a marriage without consideration is invalid, and the women have no right over it until the marriage is validated. If no dower has been settled or specified, then in such a case it shall be presumed on some recognized basis. A Muslim wife also requires immediate right over it.²⁵

Roman law regarding 'Dopatio propter ruptias' is similar to *Mahr* in all its incidents. The only difference is that the former is voluntary on the part of the husband, while *Mahr* is, as explained above, absolutely obligatory. It may be noted that the sentiment pre-supposed and encouraged by the system in the Roman Law, is that matrimony is on the husband's side a burdensome duty, which the wife must bribe him to undertake by placing at his disposal, so long as the conjugal union subsists, the income of land or other property, which in itself is

23. Fatawai-Alamgiri, Vol. I, p. 44 (Id. At p. 229)

24. S.K. Mohammad Zubair Vs. Mt. Bibi Sahida, 1942, Pat. 210

25. Supra Note 1, p. 220

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

jealously withheld from his control, and which reverts on the termination of the marriage to the wife or to her family.²⁶

From the reports of the Prophet (SAW) the utility of *Mahr* seems to be ceremonial, as he suggested the amount to be a nominal one. Even teaching of the Quran, gift of a pair of shoes and a handful of dates were considered to be dower, Umar(R) the second Caliph, through his penetrating insight and deep understanding of life and administration could aptly realize the prospect of its social utility too. That was why he recommended higher amount of dower though he restrained himself from its immediate implementation. In fact, in course of time, with ceremonial aspect, its social character has also come to light. The changed social condition has enhanced the role of *Mahr* from a simple token of respect to one of the most important matrimonial remedy; a potent weapon in the hands of women. In the subsequent pages we will see how dower, apart from bringing women from the saleable status to that of contract, provides remedy to solve her concrete matrimonial, social and economic problems. In this context the role of prompt and deferred dower has been highlighted which is followed by a discussion regarding the enforceability of dower as such in certain cases in the

26. Ibid

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

court of law. Been held in a case,²⁷ that no hard and fast principle can be laid down on which the amount of dower can be accessed to be claimed by a Muslim widow. It has to be done on the broad lines laid down in the Oudh Laws Act, and the question as to what amount is reasonable must be determined with reference to the means of the husband and status of the wife.

On the basis of above discussion it may be concluded that the conception of proprietary financial interest is the basic characteristic of dower, because the object of dower is financial assistance. All has said:

*"Except for those all others are lawful, provided ye seek (than in marriage) with gifts from your property - desiring chastity, not lust."*²⁸

In fact Dower is financial gain that accrues in marriage to a women in lieu of the pleasure to be enjoyed of her through the marriage be either valid, or irregular or even cohabitation be in doubt to Dower in which its true sense is not the exchange on consideration given or agreed to be given by the husband to his wife at time of solemnizing marriage but it ensues from the marriage contract as it effect, imposed by the law on him as a mark of respect and honour to the women.

27. Ghani Ahmad Vs. Medhi Begum, Oudh, 63 (1931).

28. Quran IV: 24

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

However, the marriage is valid though no dower were mentioned and even though it were expressly stipulated that there would be no dower".²⁹

What can be subject matter of *Mahr*

Every lawful object that has some pecuniary value may be subject matter of dower. Accordingly cash, merchandise, goods, immovable property, shares of companies or dividends etc may be settled as dower, provided the property be such that it is certain, lawful and capable of being taken into possession. *Mahr* can be either money or anything having some value and must be reasonably certain.

It cannot be a mere promise to do or to abstain from doing something which cannot be enforced by the court.³¹ In other words anything over which the right to property may be exercised, or anything which may be reduced into possession, either in the present or in the future or anything which comes within the meaning of the word *mál* may form the subject of *Mahr*.³⁰ Profits (*munafa*) accruing from land, investment, business, industry, etc. are proper subjects of *Mahr*.

29. Al-Jazeri, Abdul Rehman: *Kita-al-Fiqh*, Caiso, Vol. IV, p. 94.

31. Tahir Mahmood, *The Muslim Law of India*, p. 72 (Allahabad, 1980).

30. Fatawai Qazi Khan, Vol. I, p. 425.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

Debts due to the husband from other people are also fit to be offered as *Mahr*.³¹

Personal services as *Mahr*:

Difference of opinion exists as to whether the personal services rendered by the husband can constitute *Mahr*. In Hanafi law personal services rendered by the husband cannot be the *Mahr*; but in Ithna Ashari and Ismaili laws husband's personal services may form the *Mahr*.³² The Hanafi view is that if a free man were to marry on the stipulation that he would render his own services to his wife in lieu of *Mahr*, the marriage would be valid but the woman would be entitled to *Mahr al-mithal*. But if a slave, by his owner's consent, marries a woman on the same terms, It is lawful and the woman is entitled to the stipulated service only.³³ In this respect reference may be made to the following Hanafi authorities:

The text of the Tanwir al-Absar is as follows:

*"And if the husband be free and should marry either a free woman or slave girl on condition of serving her for a year (in other words a determinate period), the woman would be entitled to her Mahr al-mithal."*³⁴

31. Ameer Ali, Mohammedan Law, Vol. II, p. 441.

32. Supra note 31.

33. Fatawai Alamgiri, Vol. I, p. 426; Infra note 10.

34. Supra note 3

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

Radd al-Mukhtar comments on this passage in the following:

"If the husband should condition that he would serve the wife for a year, this, according to the two Sheikhs (Abu Hanifa and Abu Yusuf), would make the husband liable for the Mahr al-mithal. According to Imam Muhammad the woman would receive the value of services."³⁵

The author of the Radd al-Mukhtar further points out:

"[H]ere restriction is placed on the word 'service', for, should a man marry a woman on the condition that he would carry her load or tide her animals, or cultivate her land and such matters, which result in profit, for a determinate period by way of Mahr, such a condition is valid. For, all this is the profit of Mahr."³⁶

According to the Hanafi doctrines, an assignment of insurance policies would form a valid *Mahr*.³⁷ Among the Shias and Shafi'is, however, a free man may assign to his wife his own services in lieu of *Mahr*.³⁸

Instruction in religion

Among the Hanafis, if a man were to marry a woman, engaged to instruct her in religion, or to take her on a pilgrimage (in lieu of *Mahr*); the stipulation would be in-operative, and the woman would be entitled to *Mahr al-mithal*. Ameer Ali points out that according to the primitive Hanafi notions, when a man marries a woman on the condition of

35. Ibid; Infra note 14.

36. Ibid

37. Ibid

38. Hedaya, Vol. I Bk, ii, Chapter 3, p. 47; Sharaya, p. 290.

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

instructing her by the Quran, he becomes liable for the *Mahr* al-mithal; but according to the modern legists, the condition is valid.³⁹

The author of the *Bahr al-Raik* states that it is lawful to receive remuneration for instructing in law or the Quran, and that on this is the *fatawa*; and that consequently, it is lawful to make instructions in the Quran the subject of *Mahr*.⁴⁰ Instruction in religion or arts, an engagement to take the wife on a Pilgrimage may according to this doctrine, form the valid subject of *Mahr*.⁴¹

Future property

When something is assigned by way of *Mahr* which is not in existence at the time of fixation either substantively or as a creation of the law, such assignment is not valid. For example, if man were to settle on his wife by way of *Mahr* the future produce of certain bees or lands in his possession, it would be invalid, and the woman would have a right to the usual *Mahr*. But the assignment of a chose in action; or the sale proceeds of something of which he is a proprietor, would constitute a lawful *Mahr*.⁴²

39. Supra note 5

40. Supra note 3

41. Jama-ush-Shittal; Supra note 3

42. Radd-al-Muhtar, Vol. II, p. 517.

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

The relevant text of the Tanwir-al-Absar is as follows:

*"It is lawful for a man to assign for Mahr the ten dirhams which may be due to him from somebody else."*⁴³

It is, therefore, lawful for a man marrying a woman to fix for her *Mahr* anything which may be due to him from her, or which may be due to him from somebody else. For example, if ten dirhams are due to him from Zaid, he may fix that for *Mahr*, and the woman would be entitled to get that amount either from the husband's debtor or from the husband; if the debt is owing from the woman herself, it is on the footing of *am* (a thing in specie)⁴⁴ Radd al-Muhtar also provides:

*"Similarly, if a man were to fix for Mahr a manfa'at (profit), that also will be lawful; for example, residence in a house, or the right of riding on an animal, the right of cultivation, etc. but that the period thereof should be ascertained."*⁴⁵

The usufruct or property not the existence, contingent benefits, etc., may according to the Shia doctrine, form the valid subject of *Mahr*.⁴⁶

Quantum of Mahr

The question that what will be the *Mahr* for a particular woman on marriage is primarily left by the law to be determined by the parties to the marriage who can settle it before, at the time of or after the

43. Supra note 3

44. Ibid

45. Supra note 44

46. Supra note 43

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

marriage, of course, subject to legal conditions. It is, however, not necessary for the parties to settle this matter themselves. The law also provides definite rules for the determination of the amount of *Mahr*. However, these rules operate only if the parties have not settled any *Mahr* mutually.

Thus, where the parties are competent to contract their own marriage they may fix the *Mahr* by mutual agreement. This agreement may be oral or be reduced to writing. In the latter case, it is called *Mahr-nama* or *kabin-nama*. The *Mahr-nama* or *kabin-nama* may be incorporated in the *nikah-nama* itself.

Where a party to the marriage is incompetent to contract his or her own marriage, the *Mahr* may be fixed on his or her behalf by the marriage guardian (*wali*). In such a case if the marriage is binding on the person married, *Mahr* too will be binding.⁴⁷ The *Mahr* which the parties to a marriage may fix by stipulation is called *Mahr al-musamma* ('specified *Mahr*') and the *Mahr* to which wife becomes entitled by the operation of law, when parties have not fixed, it is called *Mahr-al-mithal* (proper *Mahr*).

47. *Supra* note 31; *Bashir Ali Vs. Hafiz Ali*, 1909 13 Cal W.N. 153.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

Extent of *Mahr al-musamma*

The classical works option ten dirhams as the legal minimum of *Mahr* (*Mahr al-aqqal*).⁴⁸ Hanafis follow the same precedent. In Hanafi law, therefore, neither the parties to a marriage nor any marriage guardian can stipulate for a *Mahr*, the value of which is less than the 'legal minimum.'⁴⁹ However, under Ithna Ashari and Ismaili laws there is no 'legal minimum' of *Mahr*. In Shafi'i law the 'legal minimum' of *Mahr* is recommended, but not insisted upon.

There is no fixed rule as to the maximum amount of *Mahr*, though the husband can at any time, during the subsistence of marriage increase the *Mahr al-musamma* as originally specified.

The Prophet (SAW) did not enunciate any fixed rule as to the amount of *Mahr*. He appears to have settled 500 dirhams upon Maimuna and the Shias consider that amount to be the *Mahr-al-sunnat*. The *Mahr* of Fatima (IRA), the daughter of Prophet (SAW), was 400 dirhams.⁵⁰ The Radd al-Muhtur, however, lays down with considerable distinctness that whatever amount exceeding the minimum, the man

48. Dirham was a silver coin weighing 2.97 grams.

49. Supra note 31; *Mohd. Shahabuddin Vs. Mt. Ummatur Rasul*, AIR 1960, Pat 511.

50. Supra note 33

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

agrees to pay as *Mahr*, he will be liable for that.⁵¹ About this rule only one exception has been reported, that is, where a minor is given in marriage by his guardian and the *Mahr* fixed is exorbitant, either beyond the means of the husband or covers his entire property, the husband's liability will be limited to the *Mahr-al-mithal*.⁵² The Shiah Shara'ya also says that there is no limit either to the maximum or minimum of *Mahr*; it being a matter of contract between the husband and the wife; so long as the article given or assigned by way of *Mahr* possesses any definite value, the assignment is considered valid.⁵³

There is no distinction so far as this principle is concerned between the Shias and the Sunnis.⁵⁴ Both schools however regard excessive *Mahr* as improper though not absolutely illegal,⁵⁵ but this recommendation has usually been disregarded by the Muslims.⁵⁶

Precedent reveals that the amount of *Mahr* depends on the social position of the parties and the conditions of society in which they live. As for instance the early Hanafi lawyers fixed ten dirhams (equal to about five shillings) as the minimum for *Mahr*, but the Malikis,

51. Supra note 44, p. 511; *Omdutoonnissa Vs. Mirza Asad Ali* 1 Sel. R. 277 (19th May 1809);
 Supra note 33

52. Supra note 33

53. Id at p. 434.

54. Supra note 32

55. *Wajeeh-un-nissa Vs. Mirza Hasan Ali*, 1 Sel. R. 206, Dec. 1808.

56. *Sugra Bibi Vs. Masuma Bibi* (1877) I.L.R. 2 All, 537.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

inhabiting a poorer and less populous country than that in which the early Hanafi lawyers flourished, considered even a smaller sum as permissible.⁵⁷

Of them large sums are stipulated as *Mahr* merely as a device to prevent, on the part of the husband, the capricious exercise of the power of divorce vested in him.⁵⁸ It is a wholesome method of maintaining the balance between the rights of husband and wife. But as the law is generally administered, it often works great injustice on children. For instance, when a man leaves children by a pre-deceased wife and a second wife on whom he has settled, either from vanity or pressure from her relatives as a device against divorce, a preposterous *Mahr*, which he never had an intention of paying but the courts enforce the contract in its entirety. In such a case, the widow gets the whole estate of the deceased to the absolute exclusion of the children.⁵⁹

At certain places and in some families large amounts of *Mahr* are being fixed without any intention of paying or exacting payment of such amounts. Another type of situation is presented by the cases

57. Supra note 33

58. Comp. Cases XXXV and XXXVIII in MacNaghten's Precedents on Mohammedan Law.

59. *Mirza Sulleman Kadar Vs. Nawab Mehdi Begum Surreya Bahu* (1893) I.L.R. 21 Cal. 136; *Mulkah Do Alum Nawab Tajdar Bahoo Vs. Mirza Jehan Kadr* (1865) 11 M.I.A. 252; See Supra note 3 at 435.

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

where a moderate *Mahr*, in accordance with the means and status of the parties, is settled in private, but to give eclat to the marriage and for purposes of 'glorification' a large amount is mentioned in public and entered in the deed which is read out to the guests. This subject is treated in the Fatawai-Alamgiri under the title of al-sum'at (with a zamma on the first syllable, and a fatah on the last).

Al-suma't according to the Lughat means a public announcement of something with the object of self-glorification. In the language of law' it means a *Mahr* announced to the public with the same object. The Shara'ya-al-Islam, states the Shiah doctrine that in such cases the private arrangement will constitute the lawful *Mahr*.⁶⁰

The Fatawai-Alamgiri gives the Hanafi rules in some detail.⁶¹ According to it if a man were to marry a woman for a certain sadaq (*Mahr*) settled privately and announced a large amount in public (fi al-Ielania) the subject assumes the following aspects:

- i) If the parties agreed to its settlement (viz; the private arrangement), or the man has called evidence to prove against her (the woman) or her guardian (if she be a minor) that the *Mahr* was that specified privately and the larger amount was sum 'at

60. Supra note 33

61. Supra note 35

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

(for glorification), in that case the *Mahr* will be that which was settled in private.

- ii) If the parties differ as to the amount settled privately and the man alleges that it was 1000 (dirhams) and the woman denies that amount, her allegation will be accepted and the *Mahr* will be that specified in the contract, unless the husband can adduce proof (of his allegation).
- iii) If, in the case of a dispute between the parties as to nature of fixation, no evidence can be called as to the excess being sum'at then the *Mahr* will be that stated in the public.⁶²
- iv) If the husband says that what he acknowledged in public was a joke (*hazi*) and the woman asserts that it was the fact, in such a case her statement will be accepted and the *Mahr* will be that mentioned publicly, unless the husband adduces proof in support of his claim.⁶³
- v) When a man and woman settle in private certain dinars as the *Mahr*, and then contract the marriage in public or condition that there shall be no *Mahr* to her, the dinars settled in private will be her *Mahr*.
- vi) If the man were to marry her on condition that the dinars shall not constitute her *Mahr*, or if he were to marry her publicly observing silence as to the *Mahr* (without specification of *Mahr*). In both these cases the marriage would be contracted at the *Mahr* al-mithal of the woman.

The Muslim law recognizes the validity of arrangements of this nature, regarding the private settlement as the real contract and treating the public declaration as nominal and fictitious. The British Indian

62. The View of Tarfaen in *Sharh-i-Mukhtasar al Tahtawi*, see Supra note 33

63. As per Shaikh al-Islam al-Sarakhsi; See Supra note 5.

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

Courts in dealing with cases of exorbitant *Mahr* have lost sight of this principle, with the result that in many instances great injustice has been occasioned to the heirs of the husband.⁶⁴

Section 92 of the Indian Evidence Act, 1972, does not touch on this question. For an allegation that the real *Mahr* was different from that stated in public and recorded in the *Mahr*-deed would not mean a variation of the written contract; it would only amount to an assertion that the real contract was different. The onus, of course, will be on the person making the allegation.

Where a wakil or a mandatory who accepts a commission to arrange a contract of marriage and to stipulate for a certain *Mahr*, exceeds his authority and fraudulently increases the *Mahr*, the husband would only be liable for it if he knew that before he consummated the marriage. It is so because the wakil, had exceeded his authority. If, before consummation, the woman knew of the fraud of the husband's agent, she would be entitled only to the sum for which the authority was actually given. If both parties were aware of the fraud then the husband would be liable for the whole amount.⁶⁵

64. See below in this chapter, cases in the subcontinent- Proof of *Mahr*.

65. Supra note 33.

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

When it is alleged that the first contract has been modified by a subsequent one, the onus rests on the party making the allegation.⁶⁶

Extent of *Mahr al-mithal*

When no *Mahr* is fixed at the time of marriage or has not been distinctly specified either before or after marriage, or has been intentionally or unintentionally left indeterminate, the woman by the operation of law becomes entitled to what is called the *Mahr-al-mithal*, the *Mahr* of her equals' or the 'proper *Mahr*' or '*khandani Mahr*'. Some call it customary *Mahr*. The proper *Mahr* of a woman is regulated with reference to the social position of her father's family and her own personal qualifications, and the *Mahr* that has been given to her female paternal relations, such as, her consanguine sisters or paternal aunts, or the daughters of her paternal uncles. The *Mahr* of wife's mother or of the girls in the wife's mother's family will not be considered unless the mother is an agnatic relation (paternal cousin etc.) of the wife's father. It, however, does not necessarily follow from the rule that the proper *Mahr* should be regulated with reference to 'the position of her father's family only and no attention should be paid to the mother's position.

66. Ibid.

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

In fixing the amount of *Mahr*, some other points, besides the customs, which prevail in the woman's paternal family, must be taken into consideration. For example, if one sister marries a rich man the other a comparatively poor man, the *Mahr* of the one cannot be taken as a standard for the *Mahr* of the other. It is, therefore, laid down that, in order to find a proper test for the proper *Mahr* of a woman, the condition of her husband in respect of wealth and lineage should be like that of the husband of the woman to whom she is compared.⁶⁷

In the same way, a woman may be superior to all the female members of her father's family in intellectual attainments or personal attractions and accordingly her *Mahr* can hardly be regulated by the *Mahr* of her less fortunately endowed female relations. The Hedaya says:

*"In regulating the Mahr-al-mithal of a woman, attention must be paid to her equality with the women from whose Mahr the rule is to be taken, in point of age, beauty, fortune, understanding and virtue, because the Mahr varies according to any difference in all these circumstances, and, in like manner, it differs according to place of residence or time."*⁶⁸

The *Mahr-al-mithal*, therefore, varies in amount according to the social position of the woman's family, the wealth of her husband, her

67. Supra note 35; Supra note 44.

68. Hedaya, Vol. I, p. 148.

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

own personal qualifications, the circumstances of the time and the conditions of society surrounding her. No fixed rule can be laid down as to the amount of *Mahr* in any particular case. It is, therefore, said that the *Mahr* of the woman, where no *Mahr* is stipulated or specified at the time of marriage, should be the *Mahr* of her equals. It is only intended to imply, that an approximation may be made by observing the custom which has prevailed in her father's family, provided she does not differ in intellectual capacity or personal attraction from the female relations with whom she is being compared.⁶⁹

The same rule respecting proper *Mahr* is in force among the Shias. Irshad puts it as follows:

The *Mahr-al-mithal* of a woman is regulated by a regard to the nobility of her birth, the beauty of her person and the custom of her family relations.⁷⁰

This is supplemented by Tahir al-Ahkam and the Jama-ush-Shittat providing:

As there exist different customs in different places in respect of *Mahr*, in fixing the amount of the *Mahr-al-mithal*, regard must be paid

69. Supra note 14 at pp. 581-582.

70. Supra note 33.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

to the *Mahr* of the women who are the equals of the female in question, in knowledge, lineage, wealth, understanding and such like.⁷¹

Among the Shias, *Mahr* can be said to be of three types, viz. -

- a) the *Mahr-al-Sunnat* or Traditional *Mahr*; it refers to the amount of the *Mahr* adopted by the Prophet (SAW) and is said to be 500 dirhams;
- b) the *Mahr-al-mithal*, and
- c) the *Mahr al-musamma*, the specified *Mahr*.

Some of the Shias are of the opinion that where no *Mahr* is settled at the time of marriage, and an approximation is made from the custom prevailing in the woman's family, the amount should not exceed the traditional 500 dirhams.⁷² In the Ithna Ashari marriage, where the wife is given discretion to fix the *Mahr* subsequent to the marriage, she can name any amount not exceeding *Mahr al-sunnat*.⁷³ The same is the general rule in Islamic law.⁷⁴

Ameer Ali, however, points out that this view has long been abandoned, and, nowadays, regulate the approximation of the customary *Mahr* among the Sunnis are in force also among the Shias.⁷⁵

71. Supra note 43.

72. Neil B.E. Baillie, Digest of Mohammedan Law, II; 21.

73. Id at p. 73.

74. Fyzee, AAA, Compendium of Fatimid Law, (1969) p. 17.

75. Supra note 33.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

In a situation when no example is available from the woman's family, the following principle can be followed:

"When there is no example forthcoming for determining, the *Mahr*-al-mithal, the position of the father's family ought to be taken into consideration. And it is allowable, may incumbent, on the judge, In the absence of examples in the woman's family to enquire into the custom among strangers occupying the same rank in life, and living under the same circumstances in different cities. And when all the conditions are not similar, so much as are identical or analogous should be considered."⁷⁶

Mahr in the family of the Prophet (SAW): relevant excerpts

"The Prophet (SAW) did neither give his daughter in marriage nor did he marry any of his wives on a *Mahr* higher than 12 (twelve) auqiyahs and a nush. 'Nush' means one half of an auqiyah. One auqiyah is 40 dirhams and one nush is twenty dirhams and thus it (the *Mahr*) amounts to 500 (five hundred) dirhams."⁷⁷

According to the Shafi'is and the Hanbalis it is desirable that a *Mahr* should not be less than (ten) dirhams. The view is adopted to avoid a conflict with Abu hanif's view. It is

76. Ibid; Radd-ul-Muhtar; Vol. II, PP. 583-584.

77. Masalik al-Ifharn, Kitab al-Nikah, Vol. 1. pp 48-49 (Tehran Ed) English versions taken from the judgement of Asma Sibi V Abdul Samad Khan (1910) 32 AII. 167.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

also desirable that it should not exceed 500 (five hundred) dirhams, which was the amount of the '*Mahr*' of the daughter of the Prophet (SAW) and his wives. The *Mahr* of Ommi Habiba, one of the wives of the Prophet(SAW), was, no doubt, 400 (four hundred) dinnars (a gold coin) but that was fixed by Najashi as a mark of distinction to the Prophet(SAW).⁷⁸

It is stated that in the account given of the marriage of Abu Jaifar, the second, that he said that All, son of Musa, proposed to marry Ommul Fazl, daughter of Abdullah Al Mamum and gave her as *Mahr* 500 (five hundred) genuine dirhams, which was the amount of *Mahr* of his great-grand-mother, Fatima.⁷⁹

The Prophet (SAW) gave Fatima in marriage to Ali. Her *Mahr* according to one report was 480 dirhams; according to another it was 400 (four hundred) mithqal of silver. According to a third report it was 500 (five hundred) dirhams and this is the most authentic report.⁸⁰

Ali (RA) has said that 'This is the Messenger of Allah. He has given his daughter Fatima to me in marriage on (a *Mahr*

78. Qustalani, A Commentary on Sahih Bukhari, Vol. VIII, PP. 48-49.

79. Baharul Anwar, Vol. X, P. 33 (Tehran Ed.)

80. Id. at p. 36.

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

of) 500 (five hundred) dirhams. I have accepted it, you should know it from him and be witness".⁸¹

It is reported from Abu Salmah, "I asked Aisha 'what was the Prophet's *Mahr*? "The *Mahr* fixed by him" she said, it was 12 (twelve) auqiyahs and a nush", she said, "Do you know what a nush is? I said 'No'. she said, 'It is one half of an auqiyah and thus it (the *Mahr*) amounts to 500 (five hundred) dirhams."⁸²

Umar said, "I do not know that the Prophet (SAW) married any of his wives or gave any of his daughter in marriage on a *Mahr* exceeding 12 (twelve) auqiyahs."⁸³

It is reported from Ommi Habibah (that) she was the wife of Abdullah (obedullah) son of Jahsh. He died in Euthopia and Najashi gave her in marriage to the Prophet (S.A.W.), fixing *Mahr* on his behalf at four thousand." According to another report at 4,000 (four thousand) dirhams, and sent her to the Prophet (SAW) with Shurhabil son of Hasanah."⁸⁴

Addition to *Mahr*

Husband has the power of making an addition to the *Mahr* during the subsistence of the marriage, just as the wife may make

81. Id at p. 35: This is a portion of the speech reported to have been made by Ali (R.A.) on the occasion of his marriage with Fatima (R.A.).

82. Mishkat, Bab al-Sadaq, P. 277 (Mujtabai Ed)

83. Ibid.

84. Ibid; See *Asma Bibi Vs. Sarnad Khan* (1910) 32 All 167.

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

abatement. Among the Shafi'is such an addition is regarded as gift. Since under Islamic law no gift is valid without seisin, any addition made by the husband to the *Mahr* requires that delivery thereof should be made at that time to the wife.⁸⁵

Among the Hanafis and Shias, the addition is not regarded gift or hiba. To render it valid, they, therefore, do not require delivery of seisin, at the time the addition is made. "It is," says the Hedaya, "an alteration of the terms of the contract in a non-essential matter within the power of the parties, and, like an addition to the price in sale, becomes incorporated with the original *Mahr*."⁸⁶

When a separation takes place before consummation, the wife is not entitled to the benefit of any post-nuptial settlement or additions made to *Mahr* after marriage.⁸⁷

Legislation in Muslim Countries⁸⁸

ALGERIA

The Algerian Family Code of 1984 is silent about the quantum of *Mahr*. The Muslims of that country will continue to be governed by

85. Supra note 3 at P. 469.

86. Hedaya, Vol. I P. 127 and Hedaya Vol. II p. 485.

87. Supra note 33.

88. For a detailed study of the legislation on laws relating to personal status in various countries see (i) Tahir Mahmood, *Family Law Reform in the Muslim World* (Bombay) (1972) and (ii) Tahir Mahmood, *Personal Law in Islamic Countries* (New Delhi, 1987).

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

their respective schools of law to which they belong, that is, Maliki and Ibadi.

EGYPT

In early Islamic history the home land of Shafi'i school adopted Hanafi legal system when it became an autonomous province of the Ottoman Empire. In the current century the Egyptian legislature made some important enactments relating to the family relations beginning from 1920 to 1929 till the recent amendment of 1985. About the quantum of *Mahr* statutory provisions were incorporated for the first time in Egypt in 1929 (Law No. 25 of 1929) under Articles 18 and 19 of the said law which read as follows:

"If there is a dispute between the spouses as to the amount of *Mahr*, the wife shall be asked to prove her claim. If she fails to do so, the statement on oath made by her husband shall be accepted, except when he states an amount which cannot be normally supposed to be the *Mahr* of a woman of her status. In such a case, the proper *Mahr* (*Mahr-al-mithal*) of the wife shall be binding on him." (Art. 18)

"Where the parties to such a dispute are one of the spouses and the heirs of the other spouse, or the heirs of both the spouses, the provision of article 18 shall apply." (Art. 19)

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

In 1977, Egypt abandoned its old constitution of 1923 and adopted a new constitution. After the new constitution in 1979, he cites other significant amendments, another clause about payment of *mata'* for two years to a divorced wife was added to above mentioned Art. 18 as part (2) by law No. 44 of 1979 called Jihan Law, 1979. In May 1985 the Jihan Law of 1979 was struck down by the Supreme Court of Egypt as *ultra vires*, the Constitution of 1977. Then in December 1985 a new law no. 100 of 1985 once again amended the two old laws on personal status 1920-1929. The provisions of earlier Article 18 and 9 have been assembled in Article 19 only with no substantial change in the pre 1985 provisions. The new added part 2 of Article 18 which related to *mata'* has been numbered as Article 18A. The only provision (Art. 19 of the amended law) that now relates to the determination of the amount of *Mahr* reads as follows:

“If there is a dispute between the spouses regarding the amount of '*Mahr*', the wife shall be asked to prove her claim. If she fails to do so, the statement on oath made by the husband shall be accepted unless he states an amount which cannot be normally supposed to be the '*Mahr*' of the woman of her status, in which case the proper *Mahr* of the wife shall be binding on him. Same rule shall apply where the parties to the dispute relating to *Mahr* are one of the spouses and the heirs of the other spouse, or the heirs of both the spouses”.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

IRAQ:

Till 1959, the Hanafi and Jafri Muslims in Iraq followed in matters of personal status, the unqualified laws of their respective schools. The only common provisions of the family law enforced by the state were found in the two Imperial Decrees, containing no provision about *Mahr*, issued by the Sultan of Turkey in 1915. The Ottoman Law of Family Rights, 1917 was not extended to Iraq. In December, 1959 the Iraqi legislature enacted the Qanun -al-Ahwal al-Shakhsiya (the law of personal status). In the Chapter III of the said Iraqi legislation some provisions were incorporated about *Mahr*. About the amount of *Mahr*, in Article 19(1) it was laid down:

"A woman is entitled to the Mahr specified in the contract; if it has not been specified she shall get the proper Mahr (Mahr al-mithal)"

The provision has been retained without any change in the Iraqi Code of Personal Status, 1959, even after many amendments made upto the latest one in 1983.

JORDAN:

In Jordan, the Ottoman Law of Family Rights, 1917, with the exception of few articles remained in force till the enactment of the

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

Jordanian law of Family Rights (al-Qanun al-haquq al-Aila) in 1951. The law of 1951 contains no substantive provision about the quantum of *Mahr*. It, however, requires a strict adherence to the entries made in the certificate of marriage. Article 51 of the law of 1951 provides:

A dispute concerning *Mahr* shall not be entertained if the claim made in this respect is different from the entry in the certificate of marriage, or is not proved by written evidence.

The law of Family Rights 1951 remained in force in Jordan until 1976, when replaced by Qanun al-Ahwal al Shakhsiyah, the Jordanian Code of Personal Status, 1976. This code was amended in 1977 giving it retrospective effect in matters of divorce. The Code contains 187 articles arranged in 19 Chapters on marriage, property and inheritance. Chapter on *Mahr* is comprised of Articles 44-65. Article 51 has been retained in the new legislation without any modifications. No other provision deals with the quantum of *Mahr*.

KUWAIT:

Since the last part of the seventeenth century Kuwait was a part of Ottoman Empire and the Ottoman legal and judicial system was made applicable there. The local rulers belonging to the Maliki School

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

of Islamic law had, however, preserved their special religious 'law and usage. During the period of 'British Protection of Kuwait', the westernized system of judicial administration set up by British claimed jurisdiction over Non-Arab inhabitants of Kuwait, however, the Arabs continued to be governed by the Islamic law – especially in the matter of personal status, family relations and succession.

After the end of British 'protection', Kuwait adopted its own constitution declaring Islam as state religion and Shariah as the primary source of legislation in the country.⁸⁹

In Article 9, it declares:

"Family is the corner stone of society founded on religion, morality and patriotism."

The laws on family relations and family property were thus to be regulated by the Shariah. Now preparation of comprehensive Encyclopaedia of Islamic Law - *Mausu'ah al Fiqhiyah* is expected in Kuwait.⁹⁰

89. Art. 2 of the Constitution of Kuwait, 1962.

90. *Supra* note 90.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

LEBANON:

In accordance with the Shariah Court Reorganization law, 1942, all Sunni Muslims in Lebanon are governed, in matters of family law, by the Ottoman Law of Family Rights, 1917 and, in matters not covered by the said laws by the select opinion in the Hanafi School.⁹¹ To Shias only those provisions of Ottoman Law apply which do not conflict with the precepts of their own schools of law.

The provisions about amount of *Mahr* in the Ottoman law of Family Rights, 1917, are found in Art. 80 of the said law which reads as under:

Mahr can either be specified (*Mahr al-musamma*) or it may be the proper *Mahr* (*Mahr al-mithal*). Proper *Mahr* in respect of a woman- shall be that of her equals on her paternal side, and if there is no such person it shall be equal to that of the women of her status in her town. Any amount may be specified as *Mahr*.

ISRAEL:

In the territory now forming the State of Israel, the Ottoman law of Family Rights, 1917, had been adopted and made applicable to the

91. Decree Law No. 241 of 1942 Art. 111.

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

local Muslims by an ordinance issued in Palestine in 1919. It continues to govern the family affairs of muslims in the new state.

LIBYA:

After revolution of 1969 besides other enactments the law on Women's Rights in Marriage and Divorce 1972-73 was passed. Its provisions are silent about *Mahr*. Islamic law will apply in this area because the Revolutionary Command Council of Libya has declared that in future the Shariah would be the principle source of all legislations in Libya.⁹²

MOROCCO:

In Morocco the Maliki School of Islamic Law had, from its very beginning a deep influence and has always been exclusively followed by Moroccan Muslims in respect of Family law. The legislation in this field was also based on the doctrine of public interest (Masaleh al-Mursala) of the Maliki jurists. Art. 17 of the Code of Personal Status, 1958 (Mudawanah al-Ahwal al-Shakhsiyah) incorporates the general rule of Shariah about the subject matter and the amount of *Mahr*. In following terms:

Anything that may be the subject of a legal obligation may form the *Mahr*; there is no maximum or minimum thereof.

92. Decree of 8th Ramzan 1391 H: 28th Oct, 1971, Art. 1.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

Article 23 provides:

Where a legally major girl agrees to *Mahr* which is less than her proper *Mahr* (*Mahr-al-mithal*) her guardian cannot object to it.

SUDAN:

Before Sudan formed a part of the Ottoman Empire the Maliki and Shafi'i Schools of Islamic law were prevalent there. Later the Hanafi legal system became dominant and remained in that position till the enactment of the Shariah Courts (Organization and Procedure) Regulations, 1915. This regulation recognized the power of the Grandqadi of the country to direct the application of non-Hanafi doctrines to any particular matter superseding the principles of rigid *taqlid*.⁹³ Till now the *Manshurat*, which have been issued by the Qadi-al-Qadat, contains following provisions about the amount of *Mahr*:

Where there is a dispute regarding the amount of *Mahr*, unless the wife can prove otherwise the husband's statements on oath shall be accepted; but if he states an amount which cannot normally form *Mahr* of a woman of wife's status, the proper *Mahr* shall be binding on him.⁹⁴

93. Shariah Court (Organization and Procedure Regulations, 1915, Art. 53).

94. Art. 10 of Law on Talaq, Marital Disputes and Gifts, 1935 (*Manshur* 41 of 1935).

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

The consent and approval of a girl who has attained puberty, is essential for the choice of her husband as well as for the amount of *Mahr*.”⁹⁵

Silence of a virgin on the choice of the bridegroom and the amount of *Mahr* shall amount to her consent and her assertion that she did not know that silence would mean consent shall not be accepted unless she is mentally weak.⁹⁶

SYRIA:

In Syria, the Ottoman law of Family Rights, 1917 survived upto 1953 when it was replaced by the Syrian Code of Personal Status (Al-Qanun al-Ahwal al Shakhsiyah), 1953. The Syrian Code of Personal Status, 1953 after its amendment in 1975, contains provisions about the quantum of *Mahr* and the increase or decrease of *Mahr* According to this the amount of *Mahr* in an irregular marriage will be:

*“The proper or specified Mahr whichever is less”*⁹⁷

About the increase or decrease of *Mahr* the Syrian Code of 1953 provides as given below:

Increase or decrease in the amount of *Mahr*, whether during the subsistence of marriage or during iddat shall be void if not made in the Court where this is done by mutual

95. Art. 6(a) of the Law on Marriage Guardianship 1960 (Manshur 54 of 1960)

96. Ibid. Art 6(b).

97. Art. 51(2)(a) Syrian Code of Personal Status, 1953.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

consent. The action must be duly registered with the qadi.”⁹⁸

TUNISIA:

Emerged as an independent nation in 1956 and became republic in 1957. The Maliki School of Islam has enjoyed a predominant following, though Hanafi School has also made some place later. The Tunisian Uniform Code of Personal Status, 1956 called the ‘Majallat al-Ahwal al-Shakhsyah’, was enforced on 1st January, 1957. The code as amended upto 1981 provides about the amount of *Mahr* as follows:

Anything which is lawful and has a monetary value may form the *Mahr*. It cannot be a valueless thing, nor is its maximum limited. *Mahr* is wife’s property which she may dispose of as she wishes.⁹⁹

YEMEN (NORTH):

The Arab Republic of Yemen is the accredited centre of the Zaidi School of Islamic Law. The non-Zaidi Muslims are followers of the Shafi’i School. The provisions of the Family law of 1978 are in conformity with the established Zaidi-Shafi’i law. It declares in Art. 159 that the ‘dominant principles of the Shariah’ be regarded as its parts for

98. Art. 57, Ibid.

99. Art. 12, Tunisian Uniform Code of Personal Status, 1956.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

matters which it did not provide for. The Code is silent about the amount of *Mahr*.

YEMEN (SOUTH):

There the Shafi'i School of Islamic law has been dominant. During British period the local customary law was often enforced in preference to Shariah denying the women the rights under Shariah. After winning independence in 1967, the Constitution was promulgated in November, 1970. By an amendment of this Constitution in 1978, it was declared:

The State shall promote marriage and establishment of Family. The law of Family Relations shall be organized on the basis of equality between men and women in rights and obligations.¹⁰⁰

In 1974 the National Legislature enacted the family law Al-Qanun al-Usrah. It put an end to customary law and enforced certain striking provisions relating to polygamy, *Mahr* and divorce with regard to the amount of *Mahr* it provides under Article 17 and 18 as follows:

The *Mahr*, inclusive of both prompt and deferred parts shall not exceed one hundred dinars.¹⁰¹

100. Art. 27, of the Constitution of Yemen (South) 1970.

101. Family Law of 1974 (Yemen South) Art. 18.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

Both the parties to the marriage shall contribute to the expenses of marriage and the requirements of the matrimonial home in conformity with their respective resources.¹⁰²

It is not lawful to pay arty money in respect of marriage against the provisions of Article 17 and 18.¹⁰³

AFGHANISTAN:

Hanafi law has been dominant in Afghanistan as the vast majority of Muslims there is Hanafi. In 1930 a group of Afghan Jurists had published an unofficial code titled *Tamassuk-al-Qada* (Judicial Compendium) based on a selection of the Hanafi legal principles. The *Fatawa-i-Alamgiri* and the Turkish Civil Code 1876 (*Majaliah*) were used by them as their source materials.

A marriage law – *Qanun-i-Izdiwaj* – adopting even non-Hanafi principles came into force in Afghanistan in 1350 A.H. (1971 AD). It was based on Egyptian law of Personal Status, 1929 and also had some provisions similar to the Dissolution of Muslim marriage Act enacted in 1939 in undivided India. After 1977 the notable provisions of Personal law enactments in Afghanistan relate to the following:

102. *Ibid.*, Art. 17

103. *Ibid.*, Art. 19.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

- i) Compulsory registration of marriages;
- ii) Family Court's prior permission for bigamy;
- iii) Judicial intervention for effecting a talaq or khula';
- iv) Availability of judicial divorce to the wife on a number of specified grounds;
- v) Divorced mother's right to custody of children;
- vi) Recognition of women's civil status on a footing of equality with men.¹⁰⁴

The amount of *Mahr* seems to have been left to be determined as per the prevalent practices among the people of Afghanistan mostly Hanafis.

BANGLADESH:

The Muslims of Bangladesh are mostly Hanafis. It was part of undivided India upto 1947 and that of Pakistan up to 1971. It has retained all the pre-liberation laws. The only notable legislations in the field of Family law are regarding dowry prohibition and restraining of child marriages. About *Mahr* the statutory position is same as in Pakistan.

IRAN:

After Islamic revolution of 1979 the uncoded Islamic Personal Law has now been restored for the Ithna Ashari Shiah majority and the Sunni minorities.

104. See Supra note 90(ii)

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

PAKISTAN:

The predominant Sunni majority in Pakistan follows the Hanafi School of Islamic law. The Ithna Ashari, Shafii, Ismaili and non-Muslims are in minority. Pakistan shares its legal history with India upto 1947. The first significant legislation in the area of family law has been the Muslim Family Law Ordinances, 1961. This ordinance sought to secure compulsory registration of marriages, control over polygamy and divorce, reformation of the principles relating to *Mahr* and maintenance of wives and recognition of inheritance rights of orphaned grand-children of deceased persons in their estates. It also amended the pre 1947 Child Marriages Restraint Act, 1929 and the Dissolution of Muslim Marriages Act, 1939, in respect of age of marriages for females. The Family Law Ordinance 1961 is silent about the amount of *Mahr* itself though section 10 of the Ordinance provides that:

Where no details about the mode of payment of *Mahr* are specified in the nikahnama or the marriage contract, the entire amount of *Mahr* shall be presumed to be payable on demand.

Tahir Mahmood comments on this saying:

*"This rule of presumption relating to the time for the payment of Mahr is supported by the Ithna Ashari School of Islamic Law."*¹⁰⁵

105. Supra note 90(i)

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

SOMALIA:

Somali Muslims have generally been following the Shafii School of Islamic Law in the matter of personal status and family relations. In Somalia, after it emerged as an independent state in July 1960, the Somalian Socialist Government declared enacted a new family Code in 1975. The Code of 1975 declared the dominant opinion in Shafii school and general principles of Islamic law and social justice to be the residual law.¹⁰⁶ About *Mahr* is provides:

The bride shall be entitled to *Mahr* as determined at the time of marriage. The upper limit for *Mahr* is SO Sh. 1000 or its value in kind.¹⁰⁷

Commenting on this Tahir Mahmood opines that:

In principle the wife's right to *Mahr* in Shariah is protected by Somalian enactment. It however, includes two such innovations which make this right a "mere token". It is provided that *Mahr* must be fixed at the time of marriage leaving no room for *Mahr* al-mithal and the upper ceiling of one thousand Somali shillings (or its equivalent in kind) on *Mahr*.¹⁰⁸

106. Art. I of the Somalian Family Code, 1975.

107. Ibid., Art. 24.

108. II ICLQ (1982) p. 250, 255.

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

He further comments that:

This ridiculous ceiling (1000 Somali Sh = £ 80, i.e: less than 1500 IR) defeats the very purpose of *Mahr* under the socio-legal strategy of Islam. It also makes quite meaningless the Somali statutory protection of the traditional rules relating to choice between 'prompt' and deferred' *Mahr*, wife's right of remitting the *Mahr* and the amount of *Mahr* payable in the cases of marriages dissolved before consummation.¹⁰⁹

BRUNEI DARUSSALAM:

The Muslims of Brunei have been following the Shafii Law in all matters relating to marriage, divorce, family relations, succession and religious usages. In 1912 and 1913 enactments regarding administration of Islamic legislations were made. These were repealed and replaced by a new law – The Religious Council, State Customs and Kathis Courts Enactments, 1955. Under the law of 1955 in Brunei besides *Mahr* (locally called mas-kahwin) there is a practice to give a wife optionally at the time of marriage also some items of gift called "pemberian". *Mahr* has been connected with the payment of damages for breach of promise to marry.

109. Ibid Art. 25-27.

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

Section 136 of the law of 1955 reads as under:

If any person shall, either orally or in writing, and either personally or through an intermediary, has entered into contract of betrothal in accordance with Muslim law and subsequently refuses without lawful reason to marry the other party to such contract such other party being willing to perform the same, the party in default shall be liable, if a male, to pay as damages the amount of the mas-kahwin which would have been payable together with other monies expended in good faith in preparation for the marriage or if a female, to return the betrothal gifts, if any, or the value thereof and to pay as damages the amount of such other monies as aforesaid; and the same may be recovered by action in the Court.¹¹⁰

MALAYSIA:

Muslims of Malaysia are the followers of Shafii School of Islamic Law. Some ancient customs known as the adat have survived and are being adhered to by the Muslims of Malaysia alongwith the law, of Islam. Under the Islamic Family Law (Federal Territory) Act, 1984 besides *Mahr* (locally called mas-kahwin) some items of gift are also payable. Section 21 of the Act contains some relevant provisions as follows:

110. The Religious Council, State Customs and 'Kathis' Courts Enactment, 1955. Art. 136.

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

- 21(1) The mas-kahwin shall ordinarily be paid by the man or his representative to the woman or her representative in the presence of the person solemnizing the marriage and at least two other witnesses;
- 21(2) The registrar shall, in respect of every marriage to be registered by him, ascertain and record:
- a) the value and other particulars of the mas-kahwin;
 - b) the value and other particulars of any pemberian;
 - c) the value and other particulars of any part of the mas-kahwin or pemberian or both that was promised but not paid at the time of the solemnization of the marriage, and the promised date of payment; and
 - d) particulars of any security given for the payment of any mas-kahwin or pemberian.

Indian Legislation

- a) **Oudh Laws Act, 1876**

With regard to the excessive stipulation of *Mahr*, provisions were incorporated in the Oudh Laws Act for application in the territory under the former Oudh State. The Allahabad High Court in *Mirza Munawar Ali Beg Vs. Smt. Itrai. Masood* (1982 All. L.J. NOC. 5) has now declared this legislation as violative of articles 14 and 15 of the

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

Constitution of India. We, however, prefer to discuss it for academic interest. By virtue of these provisions, the Courts could, in the cases where excessive *Mahr* was stipulated, allow by decree only a reasonable amount of *Mahr* with reference to the means of the husband and the status of the wife. Section 5 of the Act provides:

Where the amount of '*Mahr*' stipulated for in any contract of marriage by a Muslim is excessive with reference to the means of the husband, the entire sum provided in the contract shall not be awarded in any suit by a decree in favour of the plaintiff, or by allowing it by way of set-off, lien or otherwise, to the dependant, but the amount of the '*Mahr*' to be allowed by the Court shall be reasonable with reference to the means of the husband and the status of the wife. This rule shall be applicable whether the suit to enforce the contract is brought in the husband's life or after his death.

The provision was applicable to all the local Muslims, to whichever school of law they might belong.¹¹¹ It, however, applied only if the husband was a resident of Oudh. Where a man coming from outside Oudh married a woman of Oudh, it would have no

111. *Sulaiman Kadr Vs. Mehdi Begum* (1893) ILR 21 Cal. 135; *Abdul Rehman Khan Vs. Inayati Bibi*, AIR 1931 Oudh 63.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

application.¹¹² The husband's ability to pay *Mahr* was considered by the courts at the time *Mahr* was claimed and not at the time of marriage.¹¹³ The provisions, however, affected only *Mahr al-musamma* (specified-*Mahr*) and not *Mahr al-mithal* (proper *Mahr*).¹¹⁴

b) Dissolution of Muslim Marriage Act 1939

The Act is a piece of declaratory legislation which crystallizes a portion of Muslim law relating to the dissolution of marriage. Its official name is Dissolution of Muslim Marriages Act, 1939. Under this Act a woman married under Muslim law is entitled to obtain a decree for the dissolution of her marriage on any one or more of the given grounds like missing-husband, non-maintenance, husband's imprisonment, impotency, insanity, disease, cruelty, etc. Section 5 of the Act points out expressly that no provision of it shall in any way affect the rights of women to *Mahr* under Muslim Law. A reading of the Section which exists in the following terms will make it clear:

Nothing contained in this Act shall affect any right which a married woman may have under Muslim Law to her

112. *Zakeri Begum Vs. Sakina Begum* (1892) 19 IA 157 (P.C) *Rukai Begum Vs. Mohammad Kazim* (1910) 32 All 471.

113. *Naurozi Vs. M. Nur Khan* 50 C.W.N. 1931.

114. *Supra* note 31; For further cases see below in this Chapter.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

'*Mahr*' or any part thereof on the dissolution of her marriage.

c) Procedural Laws

Civil Procedure Code, 1908

Order XXXII-A of the Civil Procedure Code, 1908 makes provisions providing the procedure for suits relating to matters concerning the family.¹¹⁵ Mainly it provides that the proceedings may be held in camera and an endeavour shall be made by the court in the first instance to assist the parties in arriving at a settlement in respect of the subject-matter of the suit. The Court may also seek the assistance of a welfare expert whenever thought fit. Since these provisions apply to any suit or proceeding relating to the matters concerning the family in respect of which the parties are subject to their personal law, the Court may adopt the same measures for the settlement of disputes concerning *Mahr*.¹¹⁶

Order XXXII of the Civil Procedure Code, 1908 provides that every suit by a minor shall be instituted in his name by a 'next friend'¹¹⁷ where the defendant is a minor, the Court is required to appoint for him

115. Provisions added through amendment in 1976.

116. Order 32-A, r 1(g).

117. Order 32, r-1.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

or her 'guardian for the suit' called the "guardian ad litem".¹¹⁸ Till 1976 these provisions were silent about the definition of 'minor' as used here. The question before the Courts, therefore, was that when a Muslim boy or girl who was major at Muslim Law (having attained puberty) but not having attained the prescribed majority age under the Indian Majority Act, 1875, instituted a suit in respect of which the Muslim law formed the rule of decision whether the aforesaid provisions of the civil procedure code be applied or not? The judicial opinion on the point was divided.¹¹⁹ But by the Code of Civil Procedure (Amendment) Act, 1976, a definition of 'minor' was added to Order XXXII of the Code as follows:

'Minor' means a person who has not attained his majority within the meaning of Section 3 of the Indian Majority Act, 1875, where the suit relates to any of the matters mentioned in clauses (a) and (b) of Section 2 of that Act or to any other matter."

The matters mentioned in clauses (a) and (b) of Section 2 of the Indian Majority Act are:

- a) marriage, 'dower' (*Mahr*), divorce and adoption;

118. Order 32, r-3

119. See Tahir Mahmood, *Muslim Personal Law: Role of State in the Indian Subcontinent*, pp. 101-102 (Nagpur, 1983).

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

- b) religion or religious rights and usages of any classes of citizens of India.

Thus in all cases including marriage, *Mahr*, divorce, adoption, religion or religious rights and usages the parties to a suit would be deemed to be minor if they have not reached the statutory age of majority, as laid down in Section 3 of the Indian Majority Act and will, therefore, need a 'next friend' or 'guardian for the suit', as the case may be.

Limitation Act

The former Limitation Act, 1908 (now replaced) laid down that the period of limitation for filing a suit to claim unpaid *Mahr* would be as detailed below:

- a) *Mahr al mu'ajal*— three years from the date when the *Mahr* demanded but refused.¹²⁰

The court has held that both demand and refusal must be unambiguous;¹²¹ demand and refusal were no conditions for filing a suit in case of 'prompt' portion of *Mahr al-mithal*.¹²²

- b) *Mahr al Maw'ajal*— three years from the date of dissolution of marriage.¹²³

The new Limitation Act, 1963 (now in force) contains no specific provision relating to the enforcement of *Mahr*. The Courts may,

120. Schedule 1, Art. 103.

121. *Mt. Amtul Rasul Vs. Karim Baksh*, AIR 1933 Pesh 31.

122. *Muhammad Taqi Khan Vs. Farmoodi*, AIR 1941, 181.

123. Schedule 1, Art. 104.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

however, apply the old rules under the residuary provision contained in article 113 of the new Act.

Case Law in the Subcontinent

The judiciary, in the sub-continent, has not only adopted the basic dicta given by earlier authorities on Muslim law for decision making in the area of *Mahr* but has also made an effort to evolve some befitting principles on the said subject to meet the local situations. A review of these judicial deliveries helps to know as regards to *Mahr* not only the principles adopted by the courts but also the common usages and practices prevalent among the Muslims of the subcontinent. These cases are classified below under different heads:-

a) **Minimum *Mahr*:** Regarding minimum *Mahr* the judgment of Knox and Karamat Hussain JJ in *Asma Bibi*¹²⁴ is a valuable exploration. The court has provided a measure to determine the value of a dirham in the following lines:

“A dirham is a silver coin usually weighing from 45 to 50 grains, rather heavier than an English six-pence.”

“Ten dirhams according to one account make about eight shillings and eight pence sterling”.

124. *Asma Bibi Vs. Abdul Samad Khan* (1909) ILR 32 All 167.

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

The measure has helped the Courts to calculate the amount of *Mahr* in local currency. So when the present case was decided, the value of a dirham was settled to be between three and four annas and on this basis the *Mahr* of Fatima (RA), the daughter of the Prophet (S.A.W.) which was 500 dirhams was calculated as amount approximately to Rupees 107 of the British coin.

b) **Maximum *Mahr*:** The matter regarding maximum *Mahr* in the Indian context was discussed, one after another, by the Division Bench as well by as by the Full Bench of the Allahabad High Court in *Sughra Bibi*.¹²⁵ The Court was confronted with a situation where the husband on his marriage, being in poor circumstances, fixed a 'deferred' *Mahr* of Rs. 51,000.00 upon his wife, and died without leaving sufficient assets to pay such *Mahr* and his wife sued to recover the amount of such *Mahr* from his estate. The wife sued in *forma paupris*. The defendant's contention was that the wife is not entitled to recover the whole of *Mahr* from her husband's estate, without reference to his circumstances at the time of marriage or the value of his estate at his death; the plaintiff, under the circumstances, was only entitled to a reasonable amount of

125. *Sughra Bibi Vs. Masuma Bibi* (1877) ILR 2 All 573-582.

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

Mahr. The Stuart, C. J. (Pearson, J. dissenting) raised the following important question as to:

“Could a woman herself a pauper, seek to recover a *Mahr* to the extent of Rs. 51,000 although when the settlement of this ‘*Mahr*’ was supposed to be made, the husband had not a rupee in the world to call it his own.¹²⁶

He expressed a desire to reduce *Mahr* to husband’s possibilities” which could be appealing to one’s ‘sense of justice’ and falling within intelligible acceptance ‘among rational beings. He described the present case as beyond the reach of ‘intellectual apprehension’ with the facts of intangible nature. The suggested law to him was ‘visionary’. To support the contention that *Mahr* cannot be decreed in favour of a wife without reference to the husband’s financial strength, he argues:

Mahr’ is said to be ‘incumbent’ on a husband; but how can it be incumbent on him, that is, imposed on him as a duty and obligation if the thing to be done is an impossibility, and that it relates to money and property which have no existence.¹²⁷

He made an analogical reference to the following rule:

When something is mentioned as ‘*Mahr*’ which is not in existence at the time, as far instance, the future produce of

126. Id at p. 567.

127. Ibid.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

certain trees or of certain land, or the gains of a slave, the assignment is bad and the woman is entitled to her 'proper' *Mahr* (*Mahr* appropriate to the wife's family and social position).¹²⁸

Stuart C.J., commenting upon the general rule that the *Mahr* is unlimited in amount points out:

But it is not said that it is unlimited irrespective of the actual extent and value of the husband's property.¹²⁹

Referring to the expression usually used to denote the minimum *Mahr*, that is, 'the *Mahr* must be capable of appreciation — not totally destitute of value like a single grain of wheat', the Chief Justice raises the query that:

Why the 'appreciation' should not be equally applied to visionary or impossible '*Mahr*', to the case for example, of the husband not having himself a single grain of wheat but yet settling a *Mahr* of Rs. 51,000 on his wife.¹³⁰

As to the argument that higher *Mahr* is intended to (a) compensate a Shia childless widow who is precluded from taking any share from the estate of her deceased husband; and (b) protect wives from capricious declaration of talaq, he said:

128. See Baillie, Digest on Mohammedan Laws, Vol. I, p. 94.

129. Supra note 96 at p. 577.

130. Id. at p. 578.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

[The] difficulty could be met by an express settlement which would give the wife, at the time of marriage a reasonable share of, or if you please the whole of, her husband's property. This doctrine, in short, contended for, of unlimited '*Mahr*' infinitely transcends the necessity of the case as stated.¹³¹

Besides:

I am unable to altogether to appreciate that the consequences of a divorce might be fully guarded against by allowing the wife her proper *Mahr*, or even such *Mahr* as may comprise the whole of the husband's then available estate.¹³²

However, when the matter came for consideration before the Full

Bench (Pearson, Turner and Spankie, JJ), they concluded differently:

['*Mahr*' is fixed] without regard to the extent of the [husband's] income, and when satisfactory proof is adduced that a settlement of *Mahr* has been made bonafide, a lady is entitled to enforce her claim for the whole amount, although it may be in excess of the fortune which on her marriage the husband possessed or could have been expected to acquire.¹³³

131. Ibid.

132. Ibid.

133. Id. at pp. 80-81.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

Pearson, J. explains:

The plaintiff is doubtless entitled to the whole of the *Mahr* which her late husband agreed to give her, and which was fixed not in reference to his means at the time of marriage, but to the value which she possessed in the 'matrimonial market', that value being mainly determined by the local position and traditions, the surroundings and antecedents of her family. The contract cannot be set aside or treated as a nullity because he was comparatively poor when he married, or has not left assets sufficient to pay the debt but on the contrary may be enforced so far as is possible.¹³⁴

In the instant case as per Pearson, J. if *Mahr* of 51,000 had not been agreed to by the husband even then the wife would have been entitled to a *Mahr* equivalent to that amount because such an amount was customarily being fixed as *Mahr* for ladies belonging to the family of which she was a member. The claim of the plaintiff was ultimately held by the Court to be maintainable.

In Collector of Moradabad¹³⁵ the High Court granted a decree for a sum of one crore of rupees and 25,000 gold 'mohurs' as the plaintiff's *Mahr*- debt, though the effect was to deprive the son of the late husband of the plaintiff of all his property. It was said by the Court that:

134. Id. at pp. 580-81.

135. *Collector of Moradabad Vs. Harbans Singh* (1988) ILR 21 All 187.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

“they had no alternative but to pass a decree for the amount of the *Mahr* contracted for, however, extravagant that amount might be.”¹³⁶

It may be pointed out that the practice of extravagant settlement of *Mahr* was common in the families belonging to old aristocracy and still they tried to maintain the tradition of their departed grandeur. The courts have followed the trend that the settled *Mahr* must be decreed. The fact that the bridegroom has neither the present means nor expectations to pay the amount of *Mahr* or that the amount is inordinately large, is no reason for the courts to decree the suit for a smaller sum.¹³⁷

c) **Proof of *Mahr*:** In *Nujmoodeen Ahmad*¹³⁸ it had been held that a customary *Mahr* must be proved by showing a custom of the women of the wife's family to receive, rather than of men of the husband's family to pay a certain *Mahr*; being the 'consideration' paid by the bridegroom for the marriage and, therefore, regulated by the position and conduct of the bride. As regards the cases where *Mahr* is already settled but *kabirnama* is not available or it is not in vogue at a particular place, the claim can be established by oral testimony, the character of which must

136. Ibid.

137. See also *Sultan Begum Vs. Siraj ud Din Ahmad*, AIR 1936, Lah 183.

138. *Nujmooden Ahmad Vs. Beebee Hosseine* (1865) W.R. 110.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

depend on the circumstances of each particular case and the nature of the evidence available.¹³⁹ In *Zakeri Begum*¹⁴⁰ a register of marriage having been made by a 'mujtahid' in discharge of his professional duty and kept by qadi, was held to be admissible.

A practice discussed above has existed in some localities that the real *Mahr*, usually a modest sum is being settled in private while an extravagantly large and fictitious amount is being announced in the public aiming self-glorification (ul-suma't). In such cases the onus of proving, that the amount of *Mahr* publicly announced was never intended to be paid and that only the smaller amount settled in private was exigible, would be on the party making the allegation of fictitious nature of *Mahr*. In *Mt. Mohammad Sultan Begum*¹⁴¹ it was held that:

"[Where] there is no evidence as to what was the smaller figure privately fixed, on the other hand a regular kabirnama is on the recordthere cannot be any doubt as regards its genuineness, the settled *Mahr* must be paid".

In the same case, a question was raised that whether total evidence is admissible to prove that the kabirnama was mere sham and that the amount mentioned therein was nominal and that no effect

139. 7 W.R. 495 and 11 W.R., 65.

140. *Zakeri Begum Vs. Sakina Begum* (1892) 19 IA, 157.

141. Supra note 108.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

should be given to it. In this connection Agha Haider, J. ruled that oral evidence to prove such plea was not admissible under Section 92 of the Indian Evidence Act, 1872. It was said:

"I do not think that the evidence of any mental reservation contrary to the explicit terms of the written agreement could be given, as it would practically reduce section 92 of the Evidence Act to nullity."¹⁴²

Further, it was observed that:

"To hold that it was open to the defendant to lead evidence to prove that the *Mahr* which had been fixed was not really payable would virtually have the effect of cancelling one of the essential terms of the marriage."¹⁴³

However, Tek Chand, J. gives his opinion as follows:

"S. 92 operates as a bar only when oral evidence is sought to be led to vary or modify the terms of an agreement but that the oral evidence is admissible to prove that the agreement in writing was not an agreement at all, but was only a sham and was not intended to be operative."¹⁴⁴

He relied on the English case *Pym*¹⁴⁵ where Erie J. has drawn a distinction between the two situations as follows:

142. Id at p. 188: the Court relied upon *Feroz Shah Vs. Sohbat Khan* (1933) P.C. 178 and *Balkishan Das Vs. Legge* (1900) 22 All 149.

143. Ibid.

144. Ibid.

145. *Pym Vs. Campbell* (1856) 106 ER 632

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

"The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there was not an agreement at all is admissible."

Privy Council has taken the view that:

S. 92 does not fetter the courts power to arrive at the true meaning and effect of the transaction in the light of all the surrounding circumstances.¹⁴⁶

In the absence of a kabirnama, the courts have awarded the claims of the wives on oral evidence but after weighing their claims in the light of the common settlements and proper *Mahr*. In *Kulsambi*¹⁴⁷ *Mahr* of Rs. 50,000,100 ashrafis and 50 diners was awarded on the oral evidence of three witnesses and no documentary evidence saying:

"It was not uncommon for the Mahr for a Muslim wife to be fixed at a figure which is out of all proportion to the husband's means"

Similarly in *Ekram Husain*¹⁴⁸ *Mahr* of Rs.40,000 was awarded as it was the customary *Mahr* among high class Muslims in Bihar when the other party contended that the *Mahr* was only Rs.500.00.

146. Ibid, *Bajinath Singh Vs. Hajee Vally Mohammed*, AIR 1925 PC 75.

147. *Kulsumbi Vs. Bilan Khan*, AIR 1929 Nag. 121.

148. *Ekram Hussain Vs. Ali Hussain* 17 PAT. L.T. 423.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

Same trend seems to have continued later as is clear from the decision of the Patna High Court in Mohammad Shahabuddin¹⁴⁹ where the court had decreed Rs. 40,000 and one gold mohar as *Mahr* instead of Rs.500.00 as claimed by the defendant saying.

The plaintiff belonged to the highest (Siddique) class of Sheikhs in Bihar and from the financial point of view also of a good class and the plaintiff possessed all the qualifications of a good wife.¹⁵⁰

The Court has, therefore, maintained the trend adopted earlier in Nujmooden Ahmad¹⁵¹ that:

Mahr should be taken to be regulated by the position and conduct of the bride especially because the Muslims often most unequal contract marriage. It is also recognized that when there is no written contract and a dispute arises at any time regarding the amount of the '*Mahr*' the *Mahr al-mithal* (*Mahr* of the equals) ought to be taken as the standard by which the respective allegations of the parties are to be rested.¹⁵²

An overall view of court deliveries shows an inclination of courts for grant of higher *Mahr*. This seemingly has been so because of the fact

149. *Mohammed Shahabuddin Vs. Mt. Umatur Rasool*, AIR 1960 PAT 511.

150. *Id.* at p. 513.

151. *Supra* note 140

152. *Ibid*

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

that courts feel that *Mahr* is a check for unilateral exercise of divorce. In *Zakeri Begum*¹⁵³ we find that trend as follows:

‘*Mahr*’ was high among Muslims, to prevent the husband divorcing his wife in which case he would have to pay the amount stipulated.

Cases under the Oudh Laws Act, 1876

In *Mohammed Shahabuddins*¹⁵⁴, the Court has summed up the practices and trends influencing *Mahr* fixation in the subcontinent in the following lines:

The amount of ‘*Mahr*’ is ordinarily fixed by oral contract, and this is valid. There is also no limit either to maximum or minimum of the amount of ‘*Mahr*’, although the early Hanafi law givers had fixed ten dirhams as the minimum for it and Malikis consider even a smaller sum as permissible. These minima have now become obsolete and the amount of ‘*Mahr*’ depends entirely upon other considerations such as the circumstances of the husband and the wife. The necessity of a device to prevent on the part of the husband the arbitrary exercise of the power of divorce vested in him. The position of paternal family of the woman, her intellectual attainment or personal attractions and qualifications, wealth of her husband,

153. *Supra* note 114

154. *Supra* note 151

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

conditions of society surrounding her and the desire of self-glorification and vanity on the part of the parties. All these considerations enter into the determination and settlement of the amount of '*Mahr*'.

This excessive *Mahr* fixation had become so oppressive and unjust to the children of a Muslim by a predeceased wife that in 1876 an Act, called Oudh Laws Act, was enacted, whereby under Section 5 thereof the Civil Courts were given power to fix a reasonable amount of *Mahr* where the amount of *Mahr* stipulated in any contract of marriage by a Muslim was excessive with reference to the means of the husband. In such a contingency the entire sum, provided in the contract was not to be awarded in any suit by decree in favour of the plaintiff, or by allowing it by way of set off, lien or otherwise to the defendant. The amount of *Mahr* to be allowed by the court had to be reasonable with reference to the means of the husband and the status of the wife.

The extent of the application of the Act first came into question in *Rukia Begum*,¹⁵⁵ this case the marriage had taken place at Lucknow and the *Mahr* was fixed at Rs. 1, 25,000. The parties being afterwards domiciled in the province of Agra was not sufficient to authorize the courts in the province of Agra to apply to a suit brought by the wife

155. *Supra* note 114

***Chapter - III* MARRIAGE AND INSTITUTION OF DOWER**

against the heirs of her deceased husband for recovery of her *Mahr* the provision of Oudh laws Act, 1876. The preamble of the Act states:

“An Act to declare and amend the laws to be administered in Oudh.”

This indicates that it is only the Courts administering the law in Oudh which could put in force the provisions of the Act.

So far as the extent of discretion exercised by the Courts in reducing the quantum of *Mahr*, the courts have manifested unlimited powers. In Sulaiman Kadr¹⁵⁶ the Court reduced a claim of ten lakhs to Rs. 25,000 saying that it was “plainly fixed for show”. The court also stopped the monthly payments that were being made to the wife. In place of both *Mahr* and timely allowance a lump sum amount was fixed so that all the matters between the parties were settled and any future trouble is prevented.

The question as to what should be the standard for re-fixation of *Mahr* has been discussed in Abdul Rahman Khan.¹⁵⁷ The court observed:

“No hard and fast rule can be laid down on which to assess the amount of ‘*Mahr*’ which may be claimed ... it has to be

156. Supra note 113

157. Ibid

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

done on the broad lines laid down in the S.5 of the Oudh Laws Act, and the question as to what is reasonable must be determined with reference to the means of the husband and status of wife.”¹⁵⁸

In the present case the *Mahr* which was admittedly prompt *Mahr* was Rs. 50,000 but in the circumstances of the case Rs. 10,000 was said to be reasonable amount. As to the contention that the ‘*Mahr*’ should be fixed with reference to the means of the husband at the time of marriage, the court said:

“This appears to us to be contrary to the obvious intention of the section (Section 5 Oudh Laws Act).”

As regards the nature of the *Mahr* claim the court said:

“The claim for *Mahr* is a simple money claim and though the decree may be executed against the husband’s property it cannot be charged against any specific portion thereof.”¹⁵⁹

e) **Addition of *Mahr*:** Addition to the amount of *Mahr* of the wife was challenged by the heirs of a husband in *Rukaiya Begum*.¹⁶⁰ The Court held that:

158. Id at p. 65

159. Ibid

160. *Rukaiya Begum Vs. Radha Kishan* AIR 1944, All 214

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

At any time during the continuance of the marriage an addition may be made to the *Mahr*. The husband's promise to add to the *Mahr*, if accepted by the wife, becomes incorporated into the marriage contract and binds him.¹⁶¹

In *Kamarunnisa Bibi*,¹⁶² the question was regarding an oral gift of an estate, consisting of certain taluquas and Mauzaz made by the Muslim proprietor in favour of his wife. The gift was stated as had been made in consideration of *Mahr* of a certain amount which had remained unpaid and which had been agreed upon prior to the marriage. The court held the gift effective on the grounds that:

- i) It is not necessary to constitute *Mahr* under Muslim law, that the *Mahr* should be agreed upon before marriage it may be fixed (or enhanced) afterwards; and
- ii) Possession of the estate which may be the subject of the gift, if delivered in conformity with the (requirements of the) gift, that handing over of possession would be sufficient to support it, even without consideration.

f) **Anomalous Settlements:** In *Muhammad Talib Hussain*,¹⁶³ a Muslim husband and wife of the Shia persuasion referred a dispute

161. Same has been the precedent as laid down in *Kamarunnissa* (infra note 133) and *Ibrahim Vs. Isa Rasul* AIR 1916 Born. 159 and *Jahurdan Vs. Sakina Bibi* AIR 1934 Cal. 210. *Amina Bibi Vs. Mt. Ibrahim* AIR 1929 Oudh 529; *Bashir Vs. Zubeeda* AIR 1926 Oudh 186.

162. *Kamarunnissa Bibi Vs Hussaini Bibi* (1881) ILR 3 All 266; *Mt. Amina Bibi Vs. M.D. Ibrahim* AIR 1929, Oudh 520.

163. *M. Talib Hussain Vs. Inayati Jan* (1911) ILR 33 All 683.

Chapter – III* **MARRIAGE AND INSTITUTION OF DOWER*

In another case *Mubarak Un-Nissa*¹⁶⁵ a husband made over to his wife, to whom a *Mahr* of Rs. 1,25,000 was due, certain property. In the deed of transfer it was stipulated:

- i) that the wife was to take possession of the property in lieu of her *Mahr* and enjoy the usufruct;
- ii) that the property was to revert to the husband if the wife predeceased him, the '*Mahr*' debt being deemed to have been discharged; and
- iii) that if the husband predeceased the wife the property was to become hers absolutely.

The Court agreed with the contention of the wife that the transaction was not a mortgage and the mere fact that the possession was delivered to the wife did not create any hypothecation of the property for the amount of *Mahr*. It was a conveyance of the property in lieu of *Mahr* subject to the contingency which the court was not called upon to determine. The court said:

The interest created was a right to enjoy the usufruct of the property during the lifetime of the husband, which was to develop into full ownership on the happening of a contingency namely, the death of the husband in the life-time of the wife. That contingency has happened ... she has become the absolute owner of the property.¹⁶⁶

165. *Mubarak-un-Nisa Vs. Mansab Hasan Khan* (1911) ILR 33 All 421.

166. *Id.* at p.429

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

In an another settlement the wife was given possession of some property in lieu of her 'Mahir' and the husband retained possession of some other property for life, which life interest in case of urgent necessity he was authorized to sell or hypothecate, and it was agreed that on the death of the wife the persons who should be the heirs of both would be the owners of the properties. The wife predeceased her husband, who then transferred certain properties in his own right and as heir of his wife. This was challenged by the plaintiff as the properties in the possession of the wife were to devolve on their heirs after her death.

It was argued by the dependents that the agreement was unlawful as the husband could not have relinquished his chance to succeed his wife under section 6 of the T.P. Act. The court held that this was in the nature of a family settlement. There was no transfer or renunciation of an expectant interest or of a mere possibility.¹⁶⁷

Section 6 of the T.P. Act provides that:

"The chance of an heir apparent succeeding to an estate ... or any other mere possibility of a like nature cannot be transferred."

This clause seems to strike at transfers of a mere possibility or expectancy not coupled with any interest or growing out of an existing

^{167.} Id at p. 426

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

property. It does not strike at agreements by expectant heirs, such as agreement to divide a particular property in a certain way on the happening of a certain contingency.¹⁶⁸

In *Haji Mokshed Mondal*¹⁶⁹ in a somewhat similar situation it was held that:

“the transfer of land in lieu of ‘*Mahr*’ is in the nature of *hiba-bil-iwaz*. In such a case even if the *kabinnama* is not registered, if the bride is put in possession, Section 53-A of T.P. Act will apply and her father-in-law’s suit for declaration of title and confirmation of possession must fail.”¹⁷⁰

g) **Usage and practice:** In India as per the common practice, *Mahr* has to be specified at the time of performing *nikah*. So in most of the cases *Mahr* is specified (*musamma*) and the occasions for the application of the rules relating to *Mahr-al-mithal* are very rare. As to the minimum amount of *Mahr* neither the Hanafi nor the Ithna Ashari standards are being followed. The specification of *Mahr* depends upon the following:¹⁷¹

i) **Circumstances of the husband and the wife;**

168. Ibid

169. *Haji Mokshed Mondal Vs. Del Rouson Bibi* AIR 1971, Cal. 162

170. Id at p. 163

171. Supra note 151

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

- ii) Status of wife's parents;
- iii) Intellectual attainments, qualifications and education of the wife;
- iv) Husband's financial status;
- v) Social conditions; and
- vi) Customs and usage

Sometimes some more factors influence specification of the amount of *Mahr*, such as:

- i) desire of self-glorification;
- ii) personal attraction, charm and beauty of the wife; and
- iii) need to control husband's power to divorce the wife.

Impact of the Muslim Marriages Registration Act, 1980

The Act was passed by the state legislature for compulsory registration of marriages. The main object of the legislation was explained by the then Law Minister Mr. M. A. Beg, while introducing the Bill in the State Legislature, in the following words:

"The bill seeks to provide for the registration of Muslim marriages, as in the absence of a law on the subject requiring the preservation of the records regarding the solemnization of marriages people are generally dragged to litigation and innumerable difficulties. With a view to remedying the situation, it is proposed to enact a law

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

providing for the registration of all marriages solemnized by the Nikah in the state, hence the bill.”¹⁷²

The Act, however, did not provide for the registration of divorces which is equally important.

Besides other provisions the Act required that there shall be recorded on every copy of nikahnama or memorandum, as the case may be, the amount of *Mahr* ‘prompt’ and ‘deferred’ separately and also the manner of payment thereof.¹⁷³

The Act was repealed in 1981 because of pressures from different quarters. This proved legislation on paper only. However, there is already a practice of maintaining written record of the nikah and the related matters personally by the parties through nikahnama. This continues to be the only evidence available to prove the nikah and the other terms agreed to by the parties.

Taxation and *Mahr*

Mahr in its real nature is a gift to be given to the wife on the occasion of marriage. The question before us is that whether it comes within the purview of the tax laws or not. The relevant statute, the

172. 1 Islamic CLQ 1981, p. 302

173. Section 3 (4) and item No. 5 in the Schedule.

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

Indian Gift Tax Act, 1958 (as amended upto 1990), in its section 2(xii) defines a gift in the following terms:

“gift means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money’s worth...”

The language of the definition is sufficient to cover *Mahr* as a subject of gift-tax under the Act. However, section 5(1)(x) as modified in 1990, can ordinarily save it from tax upto the specified limit of rupees one lakh. The relevant provision reads as follows:

S.5(1): Gift-tax shall not be charged under this Act in respect of the gifts received by any person

(x): On the occasion of the marriage of such person subject to a maximum of rupees one lakh in value.

So *Mahr*, if delivered actually on the occasion of the marriage upto rupees one lakh will be exempted from tax. Its obligatory character at Islamic law will not affect its nature as a gift under gift-tax laws. It, however, may be noted that after the Bill of 1990 the amount of tax, wherever it is due, is collected from the donees and not from donors.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

In case the nature is not specified:

Dower is always presumed to be fixed in case of a Muslim marriage.¹⁷⁴ There is no provision in Muslim Law as to when it should be fixed. It may be fixed at any time before or after the marriage is contracted.¹⁷⁵ In theory, it should be paid before a marriage is consummated, but as there is nothing in the Quran or the Hadith to support this view, the jurist have held that a portion of it is payable at once on demand, while the remainder on the dissolution of marriage, whenever it may come to pass. Prompt dower does not become deferred by consummation of marriage and a wife has absolute right to sue for the recovery of the prompt dower even after consummation.¹⁷⁶ About the fixation of the quantum of each portion, the law is silent. It seems that the prompt and the deferred portions are set led on the discretion of the parties. In many parts of India, it is customary, among Hanafies, to relinquish the claim of the prompt portion. In such areas, the husband secures the access of the wife without disbursement of the prompt portion.

174. *Umrao Bibi Vs. Ahmed Baksh*, 55 IC 236 (Lah.)

175. *Amina Bibi Vs. Mohammed Ibrahim*, 4 Luc. 343.

176. *Mohammad Taqi Ahmad Khan Vs. Farnoodi Begum*, 1941, All. 181.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

MAHR AND AQD AL-NIKAH: A LEGAL NORMS

In some of the above given juristic and judicial observations *Mahr* has been treated, inter alia, as 'consideration' for marriage. The view, however, does not seem to be absolutely correct. Of course, there exists a dominant contractual element in Muslim marriage. But its purpose is to ensure that the marriage must be a voluntary union with free consent from each party. It cannot be asserted without difficulty that *Mahr* is a 'consideration' for marriage in the same way there is consideration in any ordinary contract. The propounders of this view have themselves faced enormous difficulties in supporting their opinion which is obvious from their muddled conclusions. Mahmood J. who is believed by some to be the main propounder of this view has, in fact in his famous judgement in the case of *Abdul Kadir*, presented only a mixed view of things. He observes:

'Mahr under the Mohammedan Law is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no Mahr is expressly fixed or mentioned at the marriage ceremony, the law confers the right of 'Mahr' upon the wife as a necessary effect of marriage. To use the language of the Hedaya, 'the payment of Mahr

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

*is enjoined by the law merely as a token of respect for its object (the woman).*¹⁷⁷

The Privy Council, having referred to the said view, has found it unsuitable to treat the analogy of 'sale' and 'Muslim marriage' as absolute. They have denied governing of *Mahr* by the same rules as consideration in a contract. It has observed.

*"The right of her Mahr is a fundamental feature of the marriage contract, it has a pivotal place in the scheme of the domestic relations affecting the mutual rights of the spouses of more than one point. While by the Muslim law, marriage itself is viewed as a civil contract and the agreement to pay a certain amount of Mahr is a part of the contract of marriage, the mere principles of the law of contract as embodied in the Indian Contract Act are insufficient to themselves to account for the main features of the law of Mahr."*¹⁷⁸

But the following lines from another judgment again sound a different note:

*"That Mahr is purely in the nature of a marriage settlement and is for consideration. It is a claim arising out of contract by the husband."*¹⁷⁹

It is about these and like statements that David Pearl has cautioned the students of Islamic law in the following terms:

"Thus, early Indian cases must be read with caution".¹⁸⁰

177. Mahmood, J's dictum in *Abdul Kadir Vs. Salima*, (1886) ILR, 8 All 149.

178. *Syed Sabir Hussain Vs. S. Farzand Hasan*, AIR 1938, P.C. 80 (1937) ILR 65 IA. (119).

179. *Kapur Chand Vs. Kadar Un-Nisa*, (1950) S.C.R. 747.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

Mahmood,J., ignoring the serious differences between a Muslim marriage and an ordinary civil contract, through analogy regards *Mahr* as consideration for connubial intercourse. But, his own words show that he had taken up this analogy with no firm belief. He said.

*"In this sense and in no other can 'Mahr under Muslim Law be regarded as a consideration for the connubial intercourse and if the authors of the Arabic text books of Muslim law have compared it with price in the contract of sale, it is simply because marriage is a civil contract., sale is the typical contract which Muslim jurists are accustomed to refer to in illustrating the incidents of the other contracts by analogy.'"*¹⁸¹

Marriage is the most important socio-religious institution of Islam with specific objectives and purposes. Resort to analogy in such a situation is not only a juristic mistake but also a deviation from the basic Islamic norms. Islam places both the parties to the marriage on an equal footing, making each subject to social, religious and legal norms. Since each spouse is offering company, support, comfort and co-operation to the other, to think of *Mahr* as an ordinary 'consideration' to the woman amounts to the denigration of her position. It may be possible to think so for any commercialized, materialistic and dehumanized brain but it is not possible to think so in Islam.

180. David Pearl, A Text Book on Muslim Personal Law, p. 60, New Hamshire, USA, 1987, 2nd ed.

181. Supra note 115.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

Sulaiman, J. has cautioned about the liberal use of this analogy in the following words:

*"The similarity cannot be pushed too far, nor can the principles governing the same of goods be applied to in all their details. Indeed, if one were to pursue the analogy for enough there would be a reduction of absurdum."*¹⁸²

The weaknesses, unsuitability and the obvious absurdity of the analogy-scenario' have become further clear from Mahmood J's Judgment in Abdul Kadir itself when he refused to the Muslim wife a right to withdraw from the conjugal society of the husband for non payment of *Mahr* following the doctrine of stoppage in transit as follows:

"This lien essentially presumes the right of ownership in the vendee, and terminates as soon as delivery has taken place".¹⁸³

The falsity of this argument has been well explained by Sulaiman, J. in Anis Begum in the following terms:

"The marriage cannot be regarded as purely a sale of the person by the wife in consideration for the payment of Mahr and even if such a grotesque analogy were to be carried to its fullest extent, it would not necessarily result in support of the observations made in Abdul Kadir's case.... The lien on goods sold may be lost when possession is

182. *Anis Begum Vs. Muhammad Istafa* (1933) 55 All 743.

183. *Supra* note 115.

Chapter - III **MARRIAGE AND INSTITUTION OF DOWER**

*lost, but that lien is revived when possession is again recovered. Again if part of the goods have been delivered and part of it is still retained, the lien on the part retained continues... if the wife after the consummation returns to her own house she can still resist restitution of conjugal rights to so long as her Mahr is not paid, because her right has been revived after the co-habitation ceased."*¹⁸⁴

Thus Mahmood, J., applying the doctrine of stoppage in transit through a wrongful analogy, has failed to provide sufficient justification for refusing a wife the right to withdraw from the husband's society for non-payment of *Mahr*. He has begun with a wrong analogy and ended with unsound logic.

Besides, when the analogy of sale and marriage is carried too far one obviously violates the Islamic spirit. This trend has obscured reality and led to absurdity. It reduces the woman to the degree of a chattel. Sulaiman, J. points out that:

*"The analogy cannot be carried too, far, it does not necessary clinch the matter."*¹⁸⁵

The real nexus between *Mahr* and marriage is manifested by the following observation of David Pearl which he has made with due intellectual concern:

184. Supra note 119.

185. Supra note 119.

Chapter – III **MARRIAGE AND INSTITUTION OF DOWER**

*“The Mahr is paid by the husband to the wife. It needs to be emphasized at the outset that the Mahr is not consideration for the contracting of marriage. The Mahr must be clearly seen as the effect of the contract of marriage rather than the price paid by the husband for acquiring the various rights which accrue to him on marriage.”*¹⁸⁶

Tajul’Urus describes *Mahr* as a *ata-o-bila-lwiz* (a gift without return). This is comparable to the honey produced by a honey-bee without any return for that. This is a legal duty of the husband with a social purpose behind it. The Prophet (S.A.W.) has approved even an iron ring as *Mahr*. How can this be said to be a consideration for connubial relationship.

Moreover, it may be clarified that *Mahr* is not something connected with divorce and to be given to the wife on the dissolution of marriage. However, if the *Mahr* in part of whole has remained unpaid during the marriage, the husband is bound to discharge this liability towards the wife immediately.¹⁸⁷

Validity of Marriage without fixing dower:

All most all the jurists of Islamic law are having the consensus on the question that a marriage contract without mentioning dower is

186. *Supra* note 118.

187. Dil. M. Afzal Wami, *Islamic Institution of Mahr*, p. 21.

Chapter – III MARRIAGE AND INSTITUTION OF DOWER

valid. Similarly a marriage contract, even with denial to pay dower is also valid. For Allah has said, *"There is no blame on you if ye divorce women before consummation or the fixation of their dower."*¹⁸⁸ It is proved from this verse that divorcing the wife contracted into marriage in which no dower is fixed, is no sin. As a divorce follows only after a valid marriage contract, the verse is in support of the effectiveness of the marriage contract without the dower being fixed.

Imam Shafii's argument: Imam Shafii in support of his argument puts forward the Quranic verse.¹⁸⁹ "And give the women (on marriage) their dower as a free gift." He argues that the God has expounded *Mahr* as "nahlah" and nahlah indicates gift. Dower in fact is a consideration in excess, which accrues in addition to and not the basis of the marriage contract itself. According to him for the fulfilment of the purposes of marriage contract, creation of valuable consideration is not necessary. Dower is an additional liability which envisages for women a remuneration in excess and so without a settlement it cannot be made incumbent upon man (except where consummation has taken place). According to Imam Shafii, therefore, dower shall not become incumbent

188. Al-Quran, surah Al-Baqarah, II:236.

189. Al-Quran, surah Al-Nisa, IV:4.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

merely on the basis of the marriage contract itself without being specifically settled.

Hanafis argument: Hanafis in support of their argument put forward Quranic verse, "Except for these, all others are lawful provided you seek (them in marriage) with gifts from your property."¹⁹⁰ They argue that Allah has made women lawful on condition of property being given to them. Marriage contract, therefore, without the fulfilment of the stipulation that property be given, shall not be valid. The women have been made lawful on condition of property being given to them. Hence without that stipulation they cannot become lawful. Uterus and life, according to Hanafis are objects of reverence. Permission to deal with them depends on the condition prescribed. In spite of the absence of that condition of dower in the marriage contract, therefore, their original reverence shall stand on its own. Thus, if there be a condition that there shall be void and proper dower shall become incumbent upon the man.

The Hanafis, in support of their point of view also cite the following tradition.¹⁹¹ "Alqamah narrated a tradition from Abdullah b. Masud that a person asked him about the dower of a woman whose

190. Al-Quran, surah Al-Nisa, IV:24.

191. This tradition has been narrated by Imam Abu Hanifah from Hammad and Hammad has narrated it from Ibrahim Nakhi, See Muwatta by Al-Shaybani, *Op. Cit.*, p. 245.

Chapter - III* **MARRIAGE AND INSTITUTION OF DOWER*

husband died before fixing her dower. He felt perplexed. He said, "I find nothing about it either in the book of Allah nor have I heard anything from the Prophet about it. I, therefore, give opinion on my own ijtiḥad. If I am right it is from Allah, if I am wrong it is from me and Satan. Allah and His Prophet are exonerated." Abdullah b. Masud, thereupon, said such women shall have treatment like that of other women." The man having heard the fatwa (legal opinion), stood up and said, "I bear witness that the Prophet in the case of Buru'bt, Washuq al-Ashjaiyyah had given the same decision." Then arose a man of Ashja tribe and said, "I bear witness to this fact", Abdullah b. Masud finding his decision in accord with the decision of the Prophet was highly pleased. So pleased never was he after his embracing Islam." This means she will be entitled to proper dower.

The Hanafis, in support of their point of view further argue that the objects of marriage cannot be gained without its being permanent. And permanency in marriage cannot be gained without the dower being incumbent. If the dower is not incumbent in marriage it will be easy for men, in their wrath and anger, to pronounce divorce. The incumbency of dower, therefore, is a means of gaining the object and rationale of marriage contract, which is realized by mutual conformity

Chapter – III* **MARRIAGE AND INSTITUTION OF DOWER*

and this mutual conformity, is not gained till the dower of woman is not venerated and respected by man.

Rejoinder to Imam Shafii: The Hanafi jurists discussing Imam Shafii's view about dower being a gift, say that the word, "nahla" in fact has been used in the meaning of faith and religion. Hence, the said Quranic verse, being directory in nature, is in reality a proof of the commandment to say dower with piety and dutifully. Dower is not a mere gift, which depends on the will of the donor.¹⁹²

Analysis:

The real cause of difference of opinion between Hanafi and Shafii jurists is that Hanafi jurists recognize the marriage contract itself as the basis of the dower becoming due whereas the Shaffis consider to consummation to be the basis of dower becoming due.

The Hanafis content that man's right over woman's uterus is created simultaneous with the marriage contract and as the consideration implies the proof of proprietorship, rights should be created against each other at the same time. For instance, in the matter of "sale" the consideration money becomes due on account of the execution of the sale deed and becomes at once to the seller on his demand. In the same manner when the marriage

192. De Tanzil-ur-Rahman, A Code of Muslim Personal Law, Vol. I, p. 226.

Chapter - III MARRIAGE AND INSTITUTION OF DOWER

contract is entered into the woman's dower becomes incumbent upon the man.¹⁹³

Dower- a religious ordinance:

On the basis of above arguments, it may be concluded that dower, like consideration money in a contract for sale, is not merely monetary consideration. Its mandatory nature in the religious law is meant to maintain the respect, honour and dignity of the wife. Thus, even if it is not mentioned in the marriage contract, proper dower shall become incumbent. Even if it is settled that there shall be no dower in the marriage contract, dower shall become incumbent and the condition shall be void.¹⁹⁴

193. Al-Kasani, *Ala al-Din: Bado I' al-Sana'I*, Cairo, Vol. ii, Kitab al-k, p. 245.

194. Ubaydullah b. Masud: *Op. Cit.* Vol. ii, p. 34.

CHAPTER-IV

DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

- Specified Dower
- Prompt dower and its Payment
- Deferred Dower and its Payment
- Proper Dower (Mahr-e-misl)
- Determination of proper dower
- Difference between Prompt and Deferred Dower
- Remedies on non-payment of Dower
- Decree in a suit for Dower
- Discretion of remission of Mahr by wife
- Payment of Mahr on death of either party

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

In order to constitute a valid marriage, under Islamic law, there should always be a consideration moving from the husband in favour of the wife, for her sole and exclusive use and benefits. This consideration is called Dower or Sadak in legal treatises, and in common parlance *Mahr*. The liability of the payment of *Mahr* is divinely of the husband except when he, during his minority, has been got contracted into marriage by guardian. The liability in that case will be that of guardian. The logic behind this according to Shariah is that a minor is incapable of contracting his marriage. In case the minor dies, his guardian shall be liable to pay the dower to his widow. This rule of law is based on the principle that a minor cannot be burdened with financial liability by the act of guardian but such a concept has not been recognized under Shia law. Under Shia law if the son has no means to pay the specified dower only then father is liable to pay it. Basically *Mahr* is of two kinds:

- (1) Specified dower
- (2) Unspecified dower or Proper Dower Customary Dower (*Mahr-al-Misl*)

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

1. Specified Dower:

Specified dower is that which is specified at the time of marriage contract between the parties. It is further classified in two kinds:

- (a) Prompt dower (Mahr-e-Muajjal)
- (b) Deferred dower (Mahr-e-Mawajjal)

(a) Prompt dower and its Payment

Dower amount is normally fixed by the parties before the solemnisation of marriage on the basis of mutual consent. No particular process or formal documentation is ordinarily required, various sects of Muslims having their own customs and usages relating to determination of amount of dower which is required under the law governing them. In India the Hanafi sect constitutes an overwhelming majority and next important is that of Shia. Followers of other sects are very small in number.

There is nothing in the Quran or in the tradition tending to show that the payment of dower settled at the solemnisation of marriage is obligatory in law, before the consummation of marriages. The latter jurist's consults have held that a portion of the *Mahr* should be

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

considered payable at once or on demand and remainder on the dissolution of the contract whether by the divorce or death of either of the parties. The portion which is payable immediately is called as prompt dower or *Mahr-e-Muajjal* and the wife can refuse to enter into the conjugal domicile until the payment of prompt portion of dower.

The following points must be noted regarding prompt dower:

- (i) Prompt dower is payable immediately on the marriage taking place and it must be paid on demand, unless delay is stipulated for or agreed. It can be realised any time before or after the marriage.
- (ii) Prompt dower does not become deferred after consummation of marriage, and a wife has absolute right to sue for recovery of prompt dower even after consummation. After consummation, she cannot resist the conjugal rights of the husband if the prompt dower has not been paid by him. If marriage is consummated, the Court may pass a decree conditional on payment of dower.
- (iii) It is only on the payment of the prompt dower that the husband is entitled to enforce the conjugal rights unless the marriage is already consummated. The right of restitution arises only after the dower has been paid.

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

- (iv) As the prompt dower is payable on demand, limitation begins to run on demand and refusal. The period of limitation for this purpose is three years, during the continuance of marriage and if the wife does not make any demand, the limitations begins to run only from the date of the dissolution of marriage by death or divorce.¹

The Privy Council in *Humaira Bibi Vs. Zubaida Bibi*¹ regarding the dower as consideration for the marriage held that it is in theory payable before consummation, but the law allows its division into two, one of which is prompt dower payable before the wife can be called to enter the conjugal domicile, the latter deferred dower payable on the dissolution of the contract by death of the either party or by divorce. In *Abdul Qadir Vs. Salima*² also it was held that in order to constitute a valid marriage the Muhammeden Law requires that there should always be a consideration moving from the husband in favour of the wife for her solace, exclusive use and benefit. This consideration is called as prompt dower.

1. AIR 1916 p.c. 46

2 ILR (1886) 8 All. 149

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

In *Kefayatul Mufti*³ defining the payment of dower it is said that it is payable after marriage on demand of the wife. It has further explained that if in the case of deferred dower, the period is not fixed for its payment then in such a situation this deferred dower will be treated as prompt dower and the wife is entitled to claim it any time after the marriage.

Thus, it becomes clear that prompt dower is payable by the husband to the wife immediately after the marriage. As Islam recognises women's right of holding property. The dower amount exclusively belongs to her. She has every right of claiming and recovering it from her husband. In the case of major woman she herself has authority to realise her dower. If she is a minor, her father and in his absence her near guardian may realise the same.⁴

If a husband refuses to pay prompt dower, the guardian of the minor wife has the right to refuse to allow her to be sent to the husband's house, and similarly the wife may refuse the husband his conjugal rights provided no consummation has taken place. The wife is

3. Vol. V, Ed. 1st, 125

4. Dr. Tanzilur Rahman: A code of Muslim Personal Law, 235, (1976)

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

under Mohammedan Law entitled to refuse herself to her husband until the prompt dower is paid and if in such circumstances, she is not residing with him, the husband is bound to maintain her.⁵ The passage in the "*Durrul Mukhtar*"⁶ on the same subject runs as follows. It is the wife's right to prevent the husband from connubial intercourse, and that is which is implied therein, and from journeying with her even though after connubial intercourse. So, for the purpose of obtaining what has been stated as prompt dower, whether wholly or partly. But she cannot do so, if the payment of dower is deferred to a future time.

And again 'it is lawful for the wife says the, "*Tanwirul Absar*"⁷ to refuse cohabitation in order to exact payment of dower, that portion of it which is payable immediately.

In the *Vikayaur Rawaeh* of which Surat Al-Wāqī'ah is the commentary, the law is stated thus "It is the right of the wife (it belongs to her) to refuse cohabitation to company the husband on a journey, and notwithstanding such refusal to obtain maintenance from him although such refusal may take place after cohabitation or valid retirement with

5. *Nuruddin Ahmad Vs. Masuda Khanam* ,PLD 1957, Dacca 242.

6. Amir Ali: Mohammedan Law, Vol. II, 318, (1976).

7. Ibid.

Chapter-IV **DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

her consent, so long as she does not receive her *Mahr* either the whole or such part as it is specified as *Muajjal* (prompt) or which is customary & prompt for such woman, without consideration of whether it is a fourth or fifth unless it is specified".⁸

In *Hedaya* also it is said "that a woman may refuse to admit her husband to a carnal connection until she receives her dower from him, so as that her right may be maintained? In the same manner as that of her husband to the object for which the return is given as in sale."⁹

In *Husain Khan Vs. Gulab Khatoon*¹⁰ following the case of *Rani Khajoorunnissa Vs. Rani Ryessunnisa*¹¹, it was held that prompt dower is payable immediately on the marriage taking place, and it must be paid on demand; it is only by the payment of prompt dower that the husband is entitled to consummate the marriage. In *Nawab Bibi Vs. Mohd. Din*¹² a suit was brought by the Nawab Bibi. Her husband also brought suit for restitution of conjugal right. The lower court decrees the suit of the wife on the condition that she will live with her husband.

8. Ibid 319.

9. Vol. I, 54

10. I.L.R., 35 Bomb., 386.

11. (1870) W.R. 371.

12. (1917) 45 I.C. 893

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

Then the wife appealed to the higher court. It was held by the High Court that a fact that a court passed a decree for restitution of conjugal right conditional on payment of prompt dower does not show that a wife's decree for prompt dower can be made conditional upon living with her husband and set aside the order of lower court. The Court further held that prompt dower can be demanded by the wife at any time either before or after consummation and she can refuse all conjugal rights on the part of the husband until it is paid.

The Allahabad High Court in *Anis Begum Vs. Mohd. Istafa*,¹³ has followed the same view and held that the right of dower is not lost after consummation of marriage. Then again the same High Court in *Mohd. Taqi Ahmad Khan Vs. Farmoodi Begum*¹⁴ followed its earlier decision and held that prompt dower can be demanded by the wife even after consummation of marriage. Prompt dower does not become deferred dower by consummation of marriage; wife has absolute right to sue for recovery of prompt dower even after consummation whenever she chooses to do so.

13. AIR 1933 All 634

14. AIR 1941 All 181

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

The Lahore High Court has also adopted the same principle as back in 1922 in *Nawab Begum Vs. Allah Rakha*¹⁵ that prompt dower can be claimed by the wife at any time before or after the consummation of marriage. It set aside the condition of lower court for wife to live with her husband and held that no such condition can be attached for the payment of prompt dower. Then the same High Court again in *Sarb Krishna Vs. Mt. Fatima*¹⁶ had made a clear distinction between prompt and deferred dower and held that the portion of dower specified in the contract is realisable at once and wife can refuse all conjugal rights until it is paid.

In *Wajid Ali Khan Vs. Shaukat Ali Khan*¹⁷, the Oudh High Court has held that under the Sunni law a wife has right to refuse to surrender her person to husband in spite of consummation of marriage so long as prompt dower remains unpaid.

The Peshawar High Court in *M. Pukhraj Begum Vs. Hidayat Ali*¹⁸ where Mrs. Pukhraj Begum was married to Hidayat Ali Shah.

15. AIR 1922 Lahore p. 172

16. AIR 1937 Lahore p. 859

17. AIR 1912 Oudh

18. AIR 1938 Peshawar

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

The marriage yet had not been consummated but dissensions had already begun between them. Hidayat Ali brought a suit for restitution of conjugal right. Pukhraj Begum instituted a suit for possession by partition of a share in a house which had been given to her in dower. Hidayat Ali contended that she is not entitled to dower as she has not agreed to consummate the marriage. The suit of husband (Hidayat Ali) was dismissed and it was held that the wife is entitled to realise the prompt dower before consummation of marriage.

Baillie¹⁹ has also endorsed the same opinion that wife can refuse to live with her husband or admit him to connubial intimacy so long as the prompt dower is not paid. In *Rehana Khatoon Vs. Iqtidaruddin*²⁰, Allahabad High Court followed its earlier decision and observed that prompt dower might be realised by the wife before or after consummation and proof of connubial intercourse between the parties is not necessary for its payment.

19. Baillie: Digest of Mohammedan Law, p. 124-5.

20. AIR (1943) All 184

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

Then in *Nasara Begum Vs. Rizwan Ali*,²¹ the court laid down that the wife has right to refuse to live with her husband and admit him to sexual intercourse so long as the prompt dower is not paid to her. Therefore it is not correct to say that the right to claim prompt dower does not precede cohabitation and comes into existence along with it.

If prompt dower is not paid by the husband then the wife is having right to refuse her husband go with him anywhere or on journey. As it is stated by *Hedaya*²² that a woman is also at liberty to resist her husband carrying her upon journey until she has received her dower. On the other hand, the husband has no power to restrain his wife from going on a journey or from going abroad or visiting her friends, until such time he has paid the whole of *Mahr Moajjal* or prompt dower. Because a husband's right to confine his wife is solely for the sake of securing to himself the enjoyment of her person, and his right to such enjoyment does not exist until after the payment for it.

But, when the husband has duly paid to his wife the whole of her dower, he is at liberty to carry her where he pleases, because the word

21. AIR (1980) All 118

22. Hedaya, Vol. I, 54

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

of God says, "*Ye shall cause them to reside in your own habitation*". Some has alleged that the husband is not at liberty to carry his wife to another city different from her own. Although he should pay her the whole dower because journey and travelling may be injurious to her, but he is at liberty to carry her to the villages in the vicinity of the city as this does not amount to travelling.²³

Thus, Prompt Dower known as *Mahr-e-Muajjal* is payable immediately after marriage on the demand of the wife.²⁴

The executing court refused to execute a decree for restitution of conjugal rights where a claim of prompt dower was not made. It was held that on the principle of justice, equity and good conscience there cannot be any interference on the ground that wife's claim prior to the decree for the restitution of conjugal rights cannot have been granted.²⁵

In case of Prompt dower, time would begin to run from the date of demand and refusal during subsistence of marriage, and if no

23. Id. at 55.

24. *Mahadeo Lal Vs. Mantram*, AIR, 1933, Pat. 281

25. *Ahmad Khan Vs. Noorjehan*, I (1985) DMC 184.

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

demand and refusal is a made, then from the dissolution of marriage by death or divorce.²⁶

Under Shia Law if the two separate kinds of dowers are not specified then the whole amount would be taken as prompt.²⁷

What the executing court has done in the present case was In consonance with the principles of Mohammedan Law bearing on the question of wife's claim for prompt dower and the husband's right to ask for restitution of conjugal rights. There was no reason why on principles, a relief which could be granted to the wife prior to the passing of the decree for restitution of conjugal rights cannot have been granted at the stage of execution. Even at that stage the claims which the parties were making not different from which they might have made, if the same issues were raised at one and the same trial. It appears that the view taken by the executing court is in consonance with the principles of justice, equity and good conscience and call for no interference.²⁸

26. *Sabir Hussain Vs. Farzand Hussain*, AIR 1934 All 52.

27. *Mirza Badar Bukht Vs. Mirza Khurram Bukht* (1873) 19 WR 315 (PC).

28. *Ahmad Khan Vs. Noorjehan*, I (1985) DMC 184 at p. 186

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

Wife is entitled to recover her prompt dower at any time before or after consummation. Consummation has no effect of converting the prompt dower into deferred dower.²⁹

Where the wife has been demanding the entire dower debt, her demand could not have been made until the whole dower was prompt.³⁰

It is absolute right of wife to recover her prompt dower and while it may be open for husband to enforce his right in a suit for restitution of conjugal rights prompt dower cannot be made conditional on wife's residing with the husband.³¹

The payment of even prompt dower is often postponed till the dissolution of the marriage but wife is under no obligation to demand it at any time during converture.³²

It is absolute right of wife to recover her prompt dower and while it may be open to husband to enforce his right in a suit for restitution of conjugal rights, prompt dower cannot be made conditional on wife's residing with the husband.³³

29. *Mohd. Taqui Ahmad Vs. Farmoodi Begum*, AIR 1941 All 181.

30. *Haji Faquir Bux Vs. Pandit Thakur Prasad*, AIR 1941 Oudh 457.

31. *Kasam Vs. Joharbi*, AIR 1930 Nag 270.

32. *Mst. Amtal Rasul Vs. Karim Baksh*, AIR 1933 Pesh 31.

33. *Kasam Vs. Joharbi*, AIR 1930 Nag 270.

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

On the other hand deferred dower does not become prompt merely because wife demands it.³⁴

Payment of prompt dower is often postponed till the dissolution of marriage but wife is not restricted to demand it at any time during continuance of marriage.³⁵

Demand of wife may be made before or after consummation. Consummation cannot be said to have any effect of converting the prompt dower into deferred dower.³⁶

In cases where it was not specified whether the dower was prompt or deferred the whole of the dower shall be presumed to be prompt.³⁷

Only reasonable proportion should be presumed to be prompt, regard being had to the custom and status of the parties and the actual amount of dower settled.³⁸

Where it is not specified what portion is prompt and what portion deferred, the whole dower is to be considered prompt is

34. *Munihar Bibi Vs. Rakha Singh*, AIR 1954 Manipur 1.

35. *Mst. Amtal Rasul Vs. Karim Baksh*, AIR 1933 Pesh 31.

36. *Mohd. Taqui Ahmad Vs. Farmoodi Begum*, AIR 1941 All 181

37. *Sheikh Mohd. Vs. Ayesha Bibi*, AIR 1938 Mad 107.

38. *Rehana Khatoon Vs. Iqtidaruddin*, AIR 1943 All 184.

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

applicable probably to cases arising among Shias. But it has been followed by the Madras High Court without consideration of the attendant circumstances.³⁹

The Shias regard the whole of the specified dower as prompt and the Sunnis regard one-half of the amounts as prompt and the other half as deferred. But the Courts differ on this point. It was held by a full Bench of the Lahore High Court, that the matter may be determined on the basis of usage or custom of wife's family and in the absence of usage or custom, one half, is presumed as prompt and the other as deferred.⁴⁰

(b) Deferred Dower (Mahr-e-Muwajjal) and its Payment:

The word Muwajjal is derived from the word Ajal, which means time or period, and is being used for deferred. So, when the dower is agreed to be paid not at the time of marriage but after that at any other time or occasion then it is called as deferred dower. In English deferred means the postponement and dower means an amount given in marriage by the husband to the wife. It means deferred dower is that dower the payment of which is not made at the time of marriage but it

39. *Masthan Saheb Vs. Assam Bibi*, (1899) IL 23 Mad 371.

40. *Nasiruddin Vs. Amatul*, 1948 Lah 135; *Mirza Bedar Bukht Vs. Mirza Khuram Bakht*, (1873) 19 WR 315 (PC).

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

is postponed for some period or certain other occasion or happening e.g. death or divorce.

Deferred dower⁴¹ shall become payable as follows:

- (a) where a time is fixed at such time.⁴²
- (b) when it is agreed to be payable on the happening of a specified event when such event happens e.g. (talaque or dissolution of marriage),
- (c) when no time is fixed on the dissolution of marriage.

It is payable on dissolution of marriage by death or divorce.

According to Ameer Ali generally in India deferred dower is a penal sum with the object to compel husband to fulfil marriage contract in its entirety.

The following points must be noted regarding deferred dower:

- (1) Deferred dower is payable on dissolution of marriage by death or divorce. But If there is any agreement as to the payment of deferred dower earlier than the dissolution of marriage, such an agreement would be valid and binding.

41. B.R. Verma: *Mohammedan Law* 151 (1978)

42. *Mirza Bedar Bakht Vs. Mirza Khurram Bakht*, 19 W.R. 315 at 318 (P.C.)

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

- (2) The wife is not entitled to demand payment of deferred dower (unless otherwise stipulated), but the husband can treat it as prompt and pay or transfer the property in lieu of it. Such a transfer will not be void as a fraudulent preference unless actual insolvency is involved.
- (3) The widow may relinquish her dower at the time of her husband's funeral by the recital of a formula. Such a remission must be a voluntary act of the widow.
- (4) The interest of the wife in the deferred dower is a vested one and not a contingent one. It is not liable to be displaced by the happening of any event, not even on her own death and as such her heir can claim the money if she dies.

If there is an agreement for payment of dower earlier than the dissolution of marriage such an agreement may be given effect to.⁴³

Deferred dower cannot be demanded till it is due. But the husband may pay it off by transferring property in lieu thereof.⁴⁴

It is an unsecured debt and the remedies which the other unsecured creditors have in such a situation would equally be available in case of transfer in favour of a wife in lieu of deferred dower, no less, no more.⁴⁵

43. *Mst. Nawab Begum Vs. Allah Rakha*, AIR 1922 Lah 172

44. *Mangnat Rai Vs. Mst. Sakina*, AIR 1934 All 441.

45. *Ghiasuddin Babu Khan Vs. C.I.T., A.P.*, 1985 Tax LR 1058

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

The husband may pay the deferred dower by transferring property in lieu thereof or may agree that even deferred dower may be recoverable on demand.⁴⁶

According to Sunni Law one part of the whole amount would be considered as prompt dower and the rest would be deferred dower. In such a case for deciding the proportion in each class; would be determined either on the basis of custom or, in absence of custom, on the basis of status of parties and actual amount involved.⁴⁷

Deferred dower is an unsecured debt and the remedies, which the other unsecured creditors have in such a situation would equally be available in case of transfer in favour of a wife in lieu of deferred dower, no less no more.⁴⁸ Husband may pay the deferred dower by transferring property or may agree that even deferred dower may be recoverable on demand.⁴⁹ If there is an agreement for payment of dower earlier than the dissolution of marriage, such an agreement may be given effect to.⁵⁰

46. *Mst. Nawab Begum Vs. Allah Rakha*, AIR 1922 Lah 172

47. *Nasiruddin Shah Vs. Amatul Mughni*, AIR 1948 Lah 135 (FB): Ameer Ali, II, pp. 447-448.

48. *Ghiasuddin Babu Khan Vs. C.I.T., A.P.*, 1985 Tax LR 1058

49. *Mst. Nawab Begum Vs. Allah Rakha*, AIR 1922 Lah 172

50. *Ibid*

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

Deferred dower cannot be demanded till it is due. But husband may pay it off by transferring property in lieu thereof.⁵¹

A dower which is payable at the death of parties, divorce or dissolution of marriage in any way, on happening of an event specified by agreement, or expiry of any particular period, is called deferred dower. In short it becomes payable on termination of marriage by death or divorce.⁵²

The deferred dower is incapable of being fairly estimated and if husband becomes an insolvent, it should not be entered in schedule of creditors.⁵³

As deferred dower is payable in the dissolution of marriage or at any fixed time or happening of any specified event, so when husband and wife or either of them renounces Islam and embraces on other religion, then in that case also the wife can claim deferred dower because the marriage is dissolved by apostasy. In *Amin Begum Vs. Soman*⁵⁴ it was held by the Allahabad High court that under the Mohammedan Law a wife's conversion from Islam to Christianity

51. *Mangat Rai Vs. Mst. Sakina*, AIR 1934 All 441.

52. *Sarb Krishna Vs. Mst. Fatima*, AIR 1937 Lah 859

53. *Sughra Bibi Vs. Gaya Prasad*, AIR 1930 All 580

54. ILR 33 All 90

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

effects a complete dissolution of marriage. The honourable Justice had relied on two earlier decisions of *Zabardast Khan Vs. his wife*⁵⁵ in which Turner (officiating C.J.) and Tribunal J., expressed the opinion that the effect of apostasy of a Mohammedan wife was to dissolve the marriage contract and that according to Mohammedan law if either party to a marriage becomes a convert to Christianity a claim of restitution of conjugal right cannot be supported.

In addition to above case which was followed by Allahabad High Court they also followed the ruling of the case of *M. Imam Din Vs. Hasan Bibi*⁵⁶ it was held in this case that according to Mohammedan law of wife's conversion from Islam to Christianity affects a complete dissolution of marriage with her Mohammedan husband.

The honourable justice has also cited the view of the jurist of Bukhara in his decision. Because there is two group of jurists on the conversion of wife from Islam. According to the jurist of Bukhara the effect of wife's abjuration from Islam effects the status of marriage and dissolve the marriage tie. Whereas the jurist of Bulkh and Samarkand

55. (1870) 2 N.W.P. H.C. Rep. 370

56. (1906) Punjab Rec. 309

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

laid down that when a woman abjures Islam from a scriptural or revealed religion like Judaism or Christianity their renunciation of faith does not dissolve the marriage.

Besides the above decisions and opinion of jurist of Bukhara he has also cited the authority of Baillie's⁵⁷ view that Apostasy from Islam by one of the married pair is a cancellation of their marriage. Sir Ronald Wilson⁵⁸ is also of the view that effect of either or both of the parties to a Mohammedan marriage renouncing the Mohammedan religion is to dissolve the marriage *if so facto*. The Andhra Pradesh High Court is also of the same view and held in *Sarwar Ali Khan Vs. Jawahar Devi*⁵⁹ "that a wife by her apostasy can not only dissolve the marriage but also claim dower from her erstwhile husband.

There is no consensus of opinion among the old and modern jurists on the point that whether either of the apostasy of husband and wife can dissolve the marriage. Among the Hanafi according to old lawyers whose view's are enunciated in Hedaya, Fatawa-i-Alamgiri and other works, apostasy from Islam of either husband or wife whether it

57. Baillie: Digest of Mohammedan Law, 182

58. Wilson, R. Anglo Mohammedan Law, 156 (1917)

59. (1964) 1 Andh. W.R. 60

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

takes place before or after consummation of marriage dissolve *if so facto* the marriage tie. The Indian courts have given effect to this doctrine without considering the development that has taken place within three centuries in Hanafi legal conception regarding the effect of apostasy of one or other of the married parties on marriage relationship.⁶⁰

The modern lawyer on the contrary held⁶¹ that "when the husband renounces Islam and the wife continues in faith the connection become unlawful, but if the man returns to Islam before the expiration of wife's "Iddat" (The probation she has to observe in case he is dead) there would be no need for remarriage between the parties. This seems from the doctrine enunciated in *Raddul Mukhtar*⁶² "that if a Muslim was to abandon the faith and to take refuge in a non-Muslim country and then divorced his wife, the divorce would not be effective. But if he returns to Islam while she was still in her iddat and then give divorce it would be operative".

60. Ameer Ali: Mohammedan Law 350 (1978)

61. Id at 351

62. Raddul Mukhtar Vol. II, 643

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

Hence there are divergent opinion among the old and modern jurists on the issue of the apostasy of husband. However, the Indian courts have followed the view of old jurists. It is seen in *Humaira Bibi Vs. Zubaida Bibi*.⁶³ The Privy Council observed that the deferred dower is payable on the dissolution of marriage contract by death of either party or by divorce. If any of the spouse changes or accepts anther religion, then in such situation the wife is entitled to ask for the payment of deferred dower from her husband. Because due to the change of religion the marriage is dissolved. Later in *Sardar Mohd. Vs. Maryam Bibi*,⁶⁴ it was held, "where the wife accepted Christianity and asked for the payment of deferred dower. The husband contended that the marriage with a Kitabiya is valid so she cannot ask for the payment the marriage is not dissolved. But the court negating the contention of husband held that the marriage is dissolved, and his wife is entitled for the payment of her deferred dower.

In *E.M. Ebrahim Vs. Mama & others*⁶⁵ Rangoon High Court observe the same principle and held that, where the wife apostized by worshipping the spirit, images and Budhist shrines, she can claim the

63. ILR 38 All 581

64. AIR 1936 Cal. 666

65. AIR 1939 Rang. 28

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

amount agreed to be paid by the husband on the dissolution of marriage by her apostasy.

Death or divorce is the only contingency on which deferred dower becomes payable. So it is not payable on the contingency that the husband has become insolvent. In *Sughra Bibi Vs. Gaya Prakash*,⁶⁶ it was held by Allahabad High Court that deferred dower cannot be claimed by wife on the insolvency of her husband. In this case a suit was brought by Ms. Sughra Bibi wife of Abdul Mughni insolvent. Abdul Mughni adjudge insolvent on 3rd December 1927 and a previous transfer has been made by him to his wife on 21st February 1927 of all his property in lieu of his dower debt. The transfer was set-aside as fraudulent, and the matter came before the High Court. Subsequently Sughra Bibi applied for to have her name entered in the schedule of creditors for the total amount of her deferred dower debt which was Rs.5000/-

The Allahabad High Court relied on Wilson's *Mohammedan*⁶⁷ law that is the deferred dower is payable only on termination of marriage

66. (1930) All L.J. 1038

67. Wilson R. Anglo Mohammedan Law, 279 (1917)

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

by death or divorce. He further observed that neither of these contingencies has yet taken place and it is not possible to say whether the husband will or will not predecease his wife nor it is possible to say that at what date the husband would predecease or divorce his wife if either of the two contingency takes place. Accordingly, it is not possible for the insolvency court to estimate what would be the present value of the deferred dower of Rs.5000/- which was to be paid if either of those contingency take place. The Allahabad High Court has relied on the decision of *Mirza Ali Vs. Qadri Khanam*⁶⁸ in which the Punjab Chief Court has held that a similar deferred dower debt is incapable of being fairly estimated and therefore should not be entitled in the schedule of creditors to claim her deferred dower debt.

The whole deferred dower becomes payable on the pronouncement of *talaq* even though revocable and it does not become deferred by retention. Even a revocable *talaq* would hasten the payment of deferred dower, that it make it prompt and thought the wife could be actually recalled by her husband it would not again become

68. (1919) 50 I.C. 774 (Punjab)

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

deferred.⁶⁹ Although there is also another opinion that it does not become payable till the expiry of iddat.⁷⁰

As deferred dower is payable on dissolution of marriage or on divorce by the husband. Death also dissolve the marriage tie so a wife can very well claim her amount of deferred dower on the death of her husband. In *Jahangir Khan Vs. Syed Abdul Rahman*,⁷¹ the Allahabad High Court relied on Fatawa Alamgiri which states that "the death dissolve the marriage tie which naturally means death of the either party".⁷² In *Mahar Ali Vs. Amani*⁷³ case also the Bengal High Court has held that death dissolve the marriage tie which naturally means death of the either party".

Thus, it become clear that the wife can ask for the payment of deferred dower only on the dissolution of marriage death, or any date of it is fixed on such data. But if the wife ask from her husband for the payment of deferred dower before the dissolution of marriage, and the husband transfers certain property in lieu of that deferred dower then

69. Baillie: Digest of Mohammedan Law, Vol. I, 129

70. Durrul Mukhtar, Vol. I, 217

71. (1921) 20 All L.J. 36

72. Baillie: Digest of Mohammedan Law, Vol. I, 352

73. (1869) 2 Beng. L.R. 17

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

such transaction with be valid. As Ameer Ali says,⁷⁴ "that there is no rule by which it necessary follows' that the postponed or deferred dower becomes realisable on the death of the husband or if she happens to be a divorce the wife on such divorce."

In *Mt. Nawab Begum Vs. Allah Rakha*⁷⁵ the dower amount was fixed Rs.5000/- half of which was prompt. All agreement was executed by which the husband authorised to his wife to demand payment of whole sum at any time. The Lahore High Court held it valid.

In another case *Nemichand Vs. Mt. Muluk Begum*⁷⁶ the full bench of Allahabad High Court held that a deferred dower can form a valid consideration for the transfer of property during the life time of her husband who has not divorced the wife. It is laid down that wife is not entitle as a right to demand payment of her deferred dower, but the husband is entitled if he please to pay his wife her dower before it is due to discharge or satisfy his obligation in any other legal way.

74. Ameer Ali: Mohammedan Law 4th Ed. (1976) Vol. II, 503

75. AIR 1922 Lahore 172

76. (1910) 5 I.C. 316 (Allah.)

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

In *Khadeja Vs. Mohd. Zahir*⁷⁷ case also the ruling of full bench of Allahabad High Court was followed. In this case a Mohammedan against whom a decree for money has been passed, about a week after the passing of the decree and in order to save the property from being taken by his creditors, in execution thereof, transferred certain immovable property belong to him to his wife in part satisfaction of the deferred dower debt. It was held that such a transfer was not voidable, as transfer made with intention to defeat the creditors.

In another case of *Mangal Rai Vs. Hira Lal*⁷⁸ the Allahabad High Court has held that when the wife makes a demand for deferred dower the husband is entitle either to pay it or make a transfer of property in her favour in lieu thereof which will be valid.

So it makes it clear that husband is not bound to pay the deferred dower demanded by the wife before the dissolution of marriage. But it depends upon the sweat will of the husband to pay it before the dissolution of marriage. And if any payment is made or any property is transferred by the husband in pursuance of the demand made by the

77. 1919 A.W.N. 64

78. AIR (1934) All 439

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

wife, then the transfer will be valid although the dower cannot also become prompt if demand by the wife during the continuance of marriage.

It was held in *Mt. Manihar Bibi Vs. Rakha Singh*⁷⁹ by Manipur High Court that there is no authority for view that deferred dower agreed to be paid on the death or divorce becomes prompt if demand by the wife during continuance of the marriage.

There is also a settled law that the deferred dower can only be claimed within three years of the dissolution of marriage. Because after passing of the three years it will be barred under the Indian Limitation Act. But as the marriage is dissolve by divorce only when it comes to the knowledge of the wife. Hence, wife claim for deferred dower occurs only on the date on which she becomes aware of the divorce. And therefore a suit filed within three years from the date of her knowledge about the divorce, is not barred in spite of the fact that talaq was pronounced in the absence of the wife and time of three years is lapsed.⁸⁰

79. AIR (1954) Manipur 1

80. *Katimunnisa Vs. Urathel Marakar*, AIR (1931) Madras 647

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

The payment of deferred dower can also be made in instalments. As it was held in *Mt. Khairun Nisa Vs. Mohd. Husain Bara*⁸¹ In this case the wife brought an action for maintenance under sec. 488 of Cr. P.C. on this the husband produce a Talaq Nama. On the basis of this Talaq Nama the court dismissed the suit of maintenance. The lower court also dismissed the suit on the ground of limitation. But in Talaq Nama husband has agreed to pay the deferred dower in instalment. The court held the payment of deferred dower in instalment as valid, and the court further on stated that when all things are considered, it is to be noted that this poor lady lived with him as his wife for a period of 15 years, that is to say the period of bloom of her youth and now when her early youth is gone she has been divorced. Apparently the defendant himself felt it right to state in the deed of divorce that he would pay deferred dower of Rs.1000/- in instalment of Rs. 20/- per month.

2. Proper Dower (*Mahr-e-misl*)

‘Proper’ (Customary) dower – It is also called *Mahr-e-Misl*. Misl means similar. Unlike unspecified dower, there may be rare Instances

81. AIR 1936 Cal. 627

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

where the dower, either prompt or deferred, was not settled and actual amount not mentioned.

Wife is legally entitled to get 'proper' dower in such cases.

A 'proper' dower is determined similar (Misl) to those dowers which were fixed of females in the father's family of wife, such as father's sisters etc.⁸² Besides the position of her father, her qualifications and dowers settled to other females, sisters, cousins etc., would also be considered.

There could be following different circumstances where the actual amount of dower could not be fixed at the time of marriage or where Courts have to resort for fixing 'proper' dower.

- (i) There might be a condition, though expressly agreed to, that for the marriage contract no dower would be paid. Such conditions could not stand because in any case wife is entitled to dower. If such is the case no amount would be fixed, and if matter comes to Court it would fix 'proper' dower amount, to be paid by the husband.
- (ii) In some cases where marriage was declared Irregular, though the dower might have been specified, the wife would get a 'proper' dower.

82. Mulla, Commentary on Mohammedan Law, Section 289

Chapter-IV* **DIFFERENT KINDS OF DOWER AND THEIR REALIZATION*

- (iii) If for some eventuality, the entire specified dower has been declared unlawful proper dower is fixed.
- (iv) Proper dower is recoverable in cases where reciprocal marriages have been arranged and dower not fixed.
- (v) Proper dower is also recoverable where a breach of legally recognized condition has been violated, even though the proper dower exceeds specified dower. In a case where it was agreed that husband would not bring a second wife to the house, the first wife would be entitled to proper dower if this condition is breached.

In fixing 'proper' dower no hard and fast rules could be formulated. It would depend in each individual case to study the circumstances and then only to fix the 'proper' dower.

When the amount is not fixed in the marriage contract or even if the marriage has been contracted on the condition that she should not claim any dower, the wife is entitled to proper dower. Proper dower is to be determined by taking into consideration the amount of dower settled upon other female members of her father's family such as her father's sisters.

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

A customary dower must be proved by showing a custom of the women of the wife's family to receive rather than of the men of the husband's family to pay, a certain dower; the Mohammedan dower being the consideration paid by the bridegroom for the marriage, and, therefore, regulated by the position and conduct of the bride, especially as Mohammedan men often contract most unequal marriages, though the means and position of the bridegroom must not altogether be excluded from consideration.⁸³

In a case where a Muslim married a Christian in England, a Pakistan Court had held that husband is competent to Talaq his wife, and in which case wife would be entitled to 'proper' dower.⁸⁴

Considerations for fixing 'proper' dower are, nobility of her birth, beauty and qualifications, besides custom in the family, but should not exceed 500 Dirhams.⁸⁵

Determination of proper dower — The proper dower or *Mahr-e-misl* is regulated with reference to the following factors:

83. *Nujmoodeen Ahmed Vs. Beebee Hosseinee* (1865) 4 WR 110

84. *Marina Vs. Nuruddin*, PLD. 1967 SC 580

85. *Razia Banu Vs. Nawab Ara Begum* 1955 NUC 3602 All (1)

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

- (a) Personal qualifications of wife, age, beauty, fortune, understanding and virtue.
- (b) Social position of her father's family.
- (c) Dower given to her female paternal relations.⁸⁶
- (d) Economic condition of her husband.
- (e) Circumstances of time.

There is no limit to the maximum amount of proper dower under Sunni Law but the proper dower under Shia Law should not exceed 500 dirhams.⁸⁷

The following facts are also to be observed while determining the amount of proper dower: —

- (i) **Local Customs** — Local customs should be observed while fixing the proper dower. "In fixing the amount of the *Mahr-i-misl* regard must be paid to local customs, with special reference to the dower of the women who are equal of the dower of the women who are equal of the female in question, in knowledge, lineage, wealth understanding and such like."⁸⁸
- (ii) **Position of the Husband** — In determining the amount of proper Dower, the, position of the husband and his status may also be

86. 52 PLR 1912

87. Baillie, II, 71

88. Jama-ush-shittat, quoted by Ameer Ali, II, 437

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

observed. But few law givers consider that in fixing the amount of proper dower, the social position of the husband should not be the criterion. In the words of Fitzgerald: "what have the circumstances of a purchaser to do with the intrinsic value of thing he buys."⁸⁹

- (iii) **Position of Wife's Father** — In the determination of amount of proper dower, the social position and the status of wife's father is also to be observed.
- (iv) **Reference to Dower of Female Paternal Relations** — The proper dower is to be fixed with reference to the amount of dower given to wife's paternal relations such as sister, consanguine sisters, paternal aunts, etc. If there is no full or consanguine sister or paternal aunt, the dowers given to the uterine sister's daughter or uncle's daughters may be considered.⁹⁰
- (v) **Personal qualifications** — In determining the amount of proper dower, wife's personal qualification e.g., her beauty, her education, her age, her understanding etc. is also to be observed.

The Laws of Shias and Sunnis are the same on the point. The *Mahr-i-misl* of a woman is regulated by a regard to the nobility of her birth, the beauty of her person, and the custom, of her female relations.⁹¹

89. Fitzgerald Mohammedan Law, 66

90. Durr-ul-Mukhtar, 78

91. Irshad quoted by Ameer Ali, II, 437

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

- (vi) Shia Law *Mahr-i-Sunnat* (Rule 88-ii) – Under the Shia Law, the proper dower does not exceed Rs. 500/- dirhams. It has become the tradition or sunnat under the Shia Law, hence giving rise to third type of dower known as *Mahr-i-Sunnat*, the other being the *Mahr-i-Musamma* (Specified Dower), and *Mahr-i-Misl* (proper dower).

Difference between Prompt and Deferred Dower –

- (1) The prompt dower becomes due at once after the solemnization of marriage.

But the deferred dower becomes due only, on the happening of such event to which it is deferred or on the expiry of time which is specified or in every either case on the dissolution of marriage by divorce or death of either party.⁹²

- (2) The prompt dower becomes payable on the demand of the wife.⁹³

But the deferred dower does not become prompt by the demand of the wife during the continuance of marriage.⁹⁴

- (3) The wife is entitled to realize the prompt dower at any time.⁹⁵

92. *Sarb Krishna Vs. Mst. Fatima*, AIR 1937 Lah 859

93. *Mahadeo Lal Vs. Maniram*, AIR 1933 Pat 281

94. *Mst. Manihar Vs. Rekha Singh*, AIR 1954 Manipur 1

95. *Rehana Khatoon Vs. Iqtidaruddin*, AIR 1943 All 184

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

But the deferred dower is payable only when it becomes due. But the husband may pay it off by transferring property in lieu thereof⁹⁶ or may agree that even deferred dower may be recoverable on demand.⁹⁷

- (4) The wife is entitled to recover her prompt dower at any time before or after consummation. Consummation has not the effect of converting the prompt dower into deferred dower.⁹⁸
- (5) Prompt dower is absolute right of wife to recover it and while it may be open for husband to enforce his right in a suit for restitution of conjugal rights, prompt dower cannot be made conditional on wife's residing with the husband.⁹⁹ The wife can refuse all conjugal rights to the husband until her prompt dower is paid. The wife has the right to deny her person (to her husband) or to go on a journey with him until she receives the dower. Her right in the consideration is the same as that of her husband in the object of the consideration (his conjugal right over her person) as in sale. The husband has no power to prevent her from travelling or going out of his house and visiting her friends until he has paid the whole exigible dower because the right of restraint is given to a person who has right, and he has not the right to secure fulfilment before rendering fulfilment (himself).

96. *Mangat Rai Vs. Mst. Sakina*, AIR 1934 All 441

97. *Mst. Nawab Begum Vs. Allah Rakha*, AIR 1922 Lah 172

98. *Mohd. Taqui Ahmad Vs. Farmoodi Begum*, AIR 1941 All 181

99. *Kasam Vs. Joharbi*, AIR 1930 Nag 270

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

So, now it has become a settled law that a wife has the right to refuse to live with her husband or admit him to sexual intercourse and if the husband sues for restitution of conjugal rights, his suit will fail. But after consummation of marriage, the suit for restitution of conjugal rights cannot be dismissed on the ground of non-payment of prompt dower.

But In case of deferred dower, nothing happens like this and denial of consummation has no effect on the payment of dower, it becomes due only on the expiry of certain period for which it is deferred.

- (6) The payment of prompt dower is often postponed till the dissolution of the marriage but wife is under no obligation to demand it at any time during coverture.¹⁰⁰

The liability to pay deferred dower binds the husband during his lifetime and his property after his death. And if the wife predeceases the husband, the dower would become due immediately and will not be postponed till the death of the husband.¹⁰¹

- (7) The only similarity between the prompt and deferred dower is that the parties are free to stipulate the immediate payment of whole specified

100. *Mst. Amtal Rasul Vs. Karim Baksh*, AIR 1933 Pesh 31

101. *Meer Mehr Ally Vs. Mst. Amanee*, 11 WR 212

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

Remedies on non-payment of Dower – Law confers upon a Muslim wife (or widow) the following three rights to compel payment of her dower:

- (1) Refusal to cohabit
- (2) Right to dower as a debt
- (3) Right to retain possession

(1) Refusal to cohabit – If the marriage has not been consummated, she has a right to refuse to cohabit with him so long as the prompt dower is not paid. In the case of a wife who is a minor or an insane, her guardian has right to refuse to send her to her husband's house till payment of dower. During her such a stay in her guardian's house the husband is bound to maintain her.

The absolute right of the wife to insist on payment of the prompt dower before giving him the access to her is lost after the consummation of the marriage.¹⁰² After consummation, the husband in his suit for restitution of conjugal rights upon her refusal can secure only a decree conditional on payment of dower.

102. *Hamidunnissa Bibi Vs. Zaheer Sheik*, 17 Cal 670

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

It was held in *Abdul Kadir Vs. Salima*¹⁰³ that the effect of non-payment of prompt dower is that the wife can refuse to cohabit or refuse to live with the husband. If the husband sues her for restitution of conjugal rights before sexual intercourse takes place, non-payment of power is a complete defence to the suit, and the suit will be dismissed. It was held in *Rabia Khatoon Vs. Mukhtar Ahmad*,¹⁰⁴ that if the suit is brought after sexual intercourse has taken place with her free consent the proper decree to pass is not a decree of dismissal, but a decree for restitution, conditional on payment of prompt dower.

When dower is deferred and is payable at a future date or on the contingency of an event, and there is no other contract to the contrary, the question is, whether she can refuse to the husband his conjugal rights or whether her guardian can detain her till it is paid. Abu Yusuf is of opinion that she can but according to Imam Muhammad and the Shia Law, she cannot have such option of denial in cases of deferred dower, and it appears from the learned decision of Mahmood, J. in

103. ILR (1886) 8 All 140

104. AIR 1966 All 548

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

*Abdul Kadir Vs. Salima*¹⁰⁵, that the latter opinion has been followed in India.

In *Wilayat Hussain Vs. Allah Rakhi*,¹⁰⁶ the court state that a Mohammedan husband could not, according to Mohammedan Law, maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by cohabitation for five years, where the wife's dower is prompt and has not been paid.

In a suit by the husband to enforce his conjugal rights, the wife was entitled to refuse to cohabit with him until he had paid her dower, and that she was not precluded from doing so by the mere fact of having consented to cohabit with him since the marriage.¹⁰⁷

(2) **Right to dower as a debt** — Dower is an unsecured debt which is recoverable by the wife or widow, or divorcee or her heirs if she is dead, from the husband when alive or from his assets when dead she is like any other unsecured creditor and her position is equal to the other creditors except on one point it is an actionable claim.

105. ILR (1886) 8 All 149

106. (1880) IL 2 All 831; See also *Sheikh Abdul Shukkoor Vs. Raheem-oon-nissa*, (1874) 6 NWPHC Rep. 94; *Jaun Beebee Vs. Sheikh Munshee Beparee*, (1865) 3 WR 93

107. *Eidan Vs. Mazhar Hossain*, (1877) IL 1 All 483

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

Their Lordships of the Privy Council held that "the dower ranks as a debt and widow is entitled along with other creditors to have it satisfied on the death of the husband, out of his estate". She is not, however, entitled to any charge on her husband's property, though such a charge may be created by agreement.¹⁰⁸ Even a father's contract on behalf of his minor son is binding upon the minor and upon the father if the minor fails to pay.

In *Syed Sabir Hussain Vs. Farzand Hussain*¹⁰⁹, a Shia Muslim stood surety for payment of the dower by his minor son. After his death his estate was held liable for the payment of his son's *Mahr* and each heir was made responsible for a portion of the wife's claim in proportion to his share in the estate of the deceased.

There is no doubt that it is within the competence of a Court to create a charge by its decree for a dower debt so that if such a charge is created and the decree has been appealed against and has become final, effect will be given to the charge, in other words, a decree creating a charge is not a nullity for want of Jurisdiction. But though it is not

108. *Hamira Bibi Vs. Zubaida Bibi*, ILR (1916) 38 All 581

109. 65 IA 119

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

beyond the power of a Court to pass a decree creating a charge, it will not ordinarily do so. To pass such a decree is to give the dower debt a priority over other debt due from the deceased. The proper decree to make is a simple money decree, and no charge is created merely because the decree directs execution by sale of properties maintained. If a decree is passed creating a charge the proper course for the Appellate Court would be to set it aside to that extent.¹¹⁰

The claim for unpaid dower constitutes a debt.¹¹¹

(3) Right to retain possession – If the widow is in actual possession of the property of the deceased husband, she is entitled to retain it until her dower is paid. This right of retention does not give her any title to the property; therefore she cannot alienate the property. The right to retain possession of husband's estate till payment of dower also arises after divorce. In no case it arises during the continuance of marriage.

A widow's right to retain possession of her husband's estate in lieu of her dower, is for a special purpose. It is by way of compulsion to

110. *Ameeroon nissa Vs. Moorad un nissa*, (1855) 6 MIA 211

111. *Mohd. Janudul Haque Vs. Mohd. Zubair Haider*, 1982 (1) Civil LJ 333 at p. 335 (Pat): AIR 1941 Nag 167: AIR 1953 SC 413 – Relied on

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

obtain speedy payment of the dower which is an unsecured debt. Where she is not in possession or has lost possession, she cannot claim to obtain it. Because her right to retain is not in the nature of a charge on the property like mortgage but a personal right against the heirs and creditors of her deceased husband.

Decree in a suit for Dower —

- (i) A decree by the Court as a simple money claim may be executed against the husband's property but it cannot be charged against any specific portion thereof.
- (ii) A decree in a suit filed by a widow for recovery of her dower-debt must be passed against the assets of the husband and not personally against those into whose possession those assets fall.

Where dower was fixed in kind i.e., immovable property.

Its transfer in law to be considered to be a gift pure and simple 'Hiba'.

An absolute title would not pass and as such a relief of declaration that she is the owner of the lands cannot be granted to her.¹¹²

A Muslim lady, and thereafter her heirs, can retain husband's father's property till, the dower debt is discharged. Even though partition of some items has taken place in the family, which is permissible under the Muslim Law.¹¹³

112. *Imambi Vs. Khaja Hussain*, AIR 1988 Kant 51

113. *Mst. Haliman Vs. Mohd. Manir*, AIR 1971 Pat 385

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

A decree in suit filed by widow for her dower debt ought to be passed against the assets left by husband and not personally against those into whose hands those assets fall.¹¹⁴

The decree for dower should not be passed creating a charge if a decree is actually passed and is allowed to become final between the parties a charge would be created.¹¹⁵

The claim for dower is a simple money claim and though the decree maybe executed against the husband property it cannot be charged against any specific portion thereof.¹¹⁶

But if a decree is actually passed and is allowed to become final between the parties, a charge would be created.¹¹⁷

A decree in a suit filed by widow for her dower debt ought to be passed against the assets left by husband and not personally against these into whose hands those assets fall.¹¹⁸

Though a decree for dower obtained by a widow against the heirs of the husband does not create a charge against those assets from which

114. *Sultan Nachi Vs. Salamar Bibi*, AIR 1938 Mad 25

115. *Syed Quaisim Hussain Vs. Habibur Rahman*, AIR 1929 PC 174

116. *Abdul Rahman Vs. Mst. Inayati Bibi*, AIR 1931 Oudh 63

117. *Syed Quaisim Hussain Vs. Habibur Rahman*, AIR 1929 PC 174

118. *Sultan Nachi Vs. Salamar Bibi*, AIR 1938 Mad 25

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

the dower may be realizable. Yet if a Court actually passes a decree for a charge and the decree becomes final between the parties, then a charge would be created and the decree would be a nullity for want of Jurisdiction.¹¹⁹

A Mohammedan widow's claim for dower is a simple money claim though that decree may be executed against the husband's property.¹²⁰

Wife has only interest for personal enjoyment of the property in her possession but she has no right of alienation.¹²¹

The Court has power to award the whole of the dower as prompt, irrespective of the fact that the parties belong to Hanafi Sect.¹²²

A decree for dower debt would not create a charge in the property of husband because it would give a priority to wife over other creditors. This charge could not be created by Court for any portion of the property not in possession of wife legally.¹²³

119. *Qasim Hussain Vs. Habibur Rahman*, AIR 1929 PC 174

120. *Abdul Rahman Khan Vs. Inayati Bibi*, AIR 1937 Oudh 63

121. *Zahoor Ahmad Vs. Jainandan Pd. Singh*, AIR 1960 Pat 147

122. *Hussein Khan Vs. Ghulab Khatoon*, ILR 35 Bom 386

123. *Kulsum Bi Vs. Bilan Khan*, AIR 1929 Nag 121; *Durga Das Vs. Hanifa Begum*, AIR 1940 Oudh 104

Chapter-IV **DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

Suits Dower and limitation — If the dower is not paid, the wife and after her death, her heirs, may sue for it. The period of limitation, according to Article 113 of the Limitation Act, for a suit to recover prompt dower is three years from the date when the dower is demanded, refused or where during the continuance of the marriage no such demand has been made, when the marriage is dissolved by death or divorce. In case of deferred dower, the period of limitation is three years, from the date when marriage is dissolved by death or divorce. Where, however, prompt dower has not been fixed, a demand and refusal is not a condition precedent for filing a suit for its recovery.¹²⁴

- (i) In the case of prompt dower, limitation period starts from the date of demand and refusal and if not made on one date, then from the date of refusal during subsistence of marriage. If no demand and refusal is made then from the dissolution of marriage either by death or divorce.
- (ii) In the case of deferred dower, limitation period starts from the date of dissolution of the marriage by death of either party or divorce. Or on the happening of the contingency or on the expiry of the time for which it is deferred.

124. *Mohammad Taqi Khan Vs. Tarmodi Begum* (1941) All 326

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

(iii) The Limitation period prescribed by the Limitation Act is in case of a registered deed, 3 years if property is movable otherwise 12 years according to Articles 55 and 62 of this Act.

Shares of dower when received by the legal inheritors thereof cease to be dower, and become part of the recipient's estate.¹²⁵

If the widow was in possession of her husband's property as security for her dower, and was subsequently thrown out of possession, the cause of action in respect of the dower must be deemed to have arisen at the time when she was ejected.¹²⁶

On a clear and unambiguous demand for payment of dower by the wife, and its refusal by the husband, it has been held by the Judicial Committee of the Privy Council that a cause of action accrues, against which limitation would begin to run. When there has been no explicit demand on the wife's part, limitation will not affect her claim with reference to the exigible dower. The wife has an absolute option to demand the *Mahr* during the life time of her husband, and to eject her own time for demanding it.¹²⁷

125. *Hosseinooddeen Chowdhry Vs. Tajennissa Khatoon*, WR 1864 (199)

126. *Soorma Khatoon Vs. Altafoonnissa Khatoon*, (1863) 2 Hay 210

127. *Khajurunnessa Vs. Saifullah Khan* (1875) 15 BLR AC 305; See also *Khijarannissa Vs. Risannissa*, (1870) 5 BLR 84; *Mulleeka Vs. Jameela*, (1876) 11 BLR 375

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

The mere fact that a widow is in possession of the property of her husband in lieu of dower does not preclude her from bringing a suit for the dower-debt against the heirs, although in such an action she would be bound to account for the rents and issues whilst the property was in her hands.¹²⁸

When the widow, the defendant in a suit for ejectment, was found to be in possession of the property in suit in lieu of dower, and that the plaintiff was not entitled to sue for possession thereof until such claim for dower has been satisfied, it was unnecessary to determine the question of the amount of such dower; that a Mohammedan widow was entitled to a lien for whatever dower remained due to her, although there might be a dispute as to what was the amount actually due, and that the heir not being entitled to recover possession from the widow so long as any portion of the dower remained unsatisfied, nor to *mesne profits*, his proper course was to bring a suit for an account of what was

128. *Ghulam Ali Vs. Saghir-un-nissa* (1901) IL 23 All 433

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

due as dower, and to pray that in satisfaction of that amount he might be put into possession of his share of the estate.¹²⁹

If the husband files an application under the U.P. Encumbered Estate Act and there has been no demand by the wife and refusal by the husband, in respect of prompt dower, the failure of the wife to make a claim for it would not extinguish the debt under Section 13 of the Act.¹³⁰

Where the first suit is filed against the minor and her father for ejectment, it does bar a suit for dower debt against the minor and the father where in a joint decree is claimed along with the minor though some facts to be proved in both the cases are the same.¹³¹

A Muslim wife like any other creditor may institute a suit for her dower and can obtain a decree against the assets of her husband.¹³²

According to the Limitation Act, the limitation period in case of a registered deed, 12 years if property is immovable (Section 62) and 3

129. *Buland Khan Vs. Janee*, (1870) 2 NW 319; *Ufzool Begum Vs. Ladlee Begum*, 2 NW 325 and *Imdad Hossein Vs. Hosseinee Baksh* (1869) 2 NW 327

130. *Mst. Khatoon Begum Vs. Saghbir Hussain*, AIR 1945 All 321

131. *Shaikh Abdul Rashid Vs. Mst. Qudratunissa*, AIR 1924 All 713

132. *Zamin Ali Vs. Azizunnissa*, AIR 1933 All 329

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

years if property is movable (Section 55). So the suit should be filed within the limitation period.¹³³

When the plaintiff did not know of her right to claim dower by reason of fraudulent conduct of the defendant, time would only begin to run against the plaintiff where she knew of the fraud.¹³⁴

If talaq once becomes effective, the mere fact that the parties lived together and the talaq again given, would not prevent the running of time from the date of first talaq.¹³⁵

A suit may be filed if the heirs of the husband wrongfully dispossess the widow; she is entitled to recover possession under Section 9 of the Specific Relief Act. In a suit for dower, she should file a claim for the entire dower, debt and not a part of it she cannot afterwards sue for the rest. Order II, Rule 2 of the Code of Civil Procedure, is applicable in dower suits.¹³⁶

133. *Mazhrul Vs. Azimuddin*, AIR 1923 Cal 507 at 513; *Mst. Kubra Begum Vs. Fazal Hussain*, AIR 1927 All 268

134. *Mst. Khadim Bibi Vs. Bure Khan*, AIR 1943 Kant 215

135. *Mst. Hayat Khatun Vs. Abdullah Khan*, AIR 1937 Lah 270

136. *Kaneez Fatima Begum Vs. Ram Nanda Dhar Dube*, AIR 1923 All

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

There is nothing to prevent a wife or widow for instituting a suit for dower for the purpose of obtaining a simple money degree against all the assets of her husband, including the property in her possession at least by surrendering possession of such property in her hands.¹³⁷

The wife or widow, or divorcee or her heirs have a right to sue for the recovery of dower. But if she is already in possession of the husband's property enjoying right of retention of lien, she can file a suit for administration of property.¹³⁸

In the case of a valid marriage if it has been dissolved by divorce or apostasy of husband or wife, if consummation of marriage has taken place, the wife is entitled to recover full specified dower whether settled before or the time of or after marriage.¹³⁹

The dower will not be lost in any case even by apostasy or other misconduct of wife such as committed adultery or concealing illicit pregnancy or even by the murder of husband by her.¹⁴⁰

137. *Amir Hasan Khan Vs. Mohd. Nazir Hasan*, AIR 1932 All 345 at p. 347

138. *Mohd. Sharafat Vs. Wahida*, 28 IC 199

139. *Mst. Hakimbi Vs. Mir Ahmad*, AIR 1931 Sind 17

140. *Fulsambi Vs. Abdul Kadir*, AIR 1921 Bom 205

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

If the marriage has been dissolved by the death of either party, whether consummation of marriage has taken place or not the dower becomes confirmed.¹⁴¹

The payment of prompt dower is often postponed till the dissolution of the marriage but wife is under no obligation to demand it at any time during converture.¹⁴²

Time will not run against the wife for suit for recovery of dower debt until in case of prompt dower there is positive and unambiguous demand, also a refusal.¹⁴³

Time will not run against the wife for suit for recovery of dower debt where the marriage is dissolved by divorce only when it comes to wife's notice.¹⁴⁴

When a woman dies leaving her husband and three sons one of whom being minor as heirs. A suit of recovery of their shares of dower debt is brought by all. The suit is within time.¹⁴⁵

141. *Malik Iftikhar Wali Vs. Sarvari Begum*, AIR 1929 All 369; See also Hedaya, 44 & 60

142. *Mst. Amtal Rasul Vs. Karim Baksh*, AIR 1933 Pesh 31

143. *Mst. Zohrabibi Vs. Ganesh Prasad*, AIR 1925 Oudh 267

144. *Kathiyumma Vs. Urathel Marrakar*, AIR 1931 Mad 637

145. *Mohd. Zahur Ahsan Vs. Mst. Maimuna*, AIR 1929 All 142

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

It was held that "after consummation of marriage", non-payment of dower even though exigible, cannot be pleaded in defence of an action for restitution of conjugal rights; the rule so laid down having, of course, no effect upon the right of the wife to claim her dower in a separate suit."¹⁴⁶

If the husband sues for restitution of conjugal rights before consummation of marriage takes place, non-payment of the dower is a complete defence to the suit.¹⁴⁷

If the widow is inducted into possession either by consent or otherwise except by force or fraud she is entitled to retain the possession in lieu of dower payable to her and the limitation of three years from the date of the death of the husband does not operate in the event of possession of the property of the widow.¹⁴⁸

Where talaq deed by husband was not written in presence of Qazi and other witnesses. Date, month or year of talaq not mentioned in the deed. It was held that talaq deed was invalid.¹⁴⁹

146. *Abdul Kadir Vs. Salima* (1886) 8 All 149

147. *Hussein Khan Vs. Sardar Khan*, 35 Bom 386

148. *Syed Yosuf Akbar Hussaini Vs. Syed Murtuza Akbar Hussaini*, 1983 (1) Civil LJ 464 at p. 469 (AP); ILR 43 Mad 214; AIR 125 PC 63; AIR 1937 Lah 589; AIR 1930 All 881; AIR 1953 SC 413 - Relied on

149. *Shaikh Mobin Vs. State of Maharashtra*, 1996 (2) Civil LJ 754 (Bom)

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

Talaq can be pronounced anywhere. Even selection particular Qazi too is not necessary for giving validity to talaq.¹⁵⁰

Law recognizes talaq by single pronouncement and also by three pronouncements. Only difference between these two is that talaq by single pronouncement is revocable if husband starts cohabiting with wife.¹⁵¹

In this case, no evidence has been adduced by the husband either to prove that there was reconciliation attempt or to prove that the talaq pronouncement was attested by the persons from both the family or from both the Jamaths or to show three talaqs were pronounced through the said letter. Both the Courts would correctly hold that the letter does not indicate the pronouncement of triple talaq. Therefore, the decree passed by the Court below is correct.¹⁵²

According to the Shariat Law, the correct law for talaq as ordained by the holy Quran is that, talaq must be for a reasonable cause and proceeded by attempts for reconciliation between the husband and

150. *Banu Vs. Kutubuddin Sulamanji Vimanwala*, 1996 (1) Civil LJ 125 (Bom)

151. *Banu Vs. Kutubuddin Sulemanji Vimanwala*, 1996 (1) Civil LJ 125 (Bom)

152. *M. Shahul Hameed Vs. A. Salimo*, AIR 2003 Mad 162:2003 1 Mad LW 183 (Mad)

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

wife by two elders, one by wife's family and the other from the husband's family. If the attempts fail talaq may be affected the husband alleging that he divorced his wife must lead satisfactory evidence to prove the pronouncement of talaq. When the husband failed to prove pronouncement of talaq, order of family Court negative plea of divorce would be proper.¹⁵³

In the instant case, it was established that wife was minor at time of marriage. It was held that even if she had stayed with husband and marriage was consummated when she was minor, it would not end her right to repudiate marriage after attaining puberty.¹⁵⁴

Discretion of remission of *Mahr* by wife:

“And give the women on marriage their dower as a free gift, but if they of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.”

(Quran – Sura 4: Aayat 4)

According to this provision the wife is free to either realize the whole amount of dower or remit the dower or any part of it of her own free will. This remission should be made without any consideration.

153. *Mohd. Ibrahim Vs. Mehrunisa Begum*, AIR 2004 Kant 261

154. *Shabnam Vs. Mohd. Shafiq*, AIR 2004 Raj 303

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

Acceptance of remission of the dower by the husband or his heirs is not compulsory. But if the husband refuses to accept the remission, then it returns to the wife.¹⁵⁵

When the wife is under mental tension, such as her husband is on death-bed or has died, at that time if she makes a remission, her consent cannot said to be free.¹⁵⁶

The age of majority for the purpose of making remission should be 18 years as under the Indian Majority Act, 1875. But the Allahabad and Calcutta High Courts hold the opinion that the age of majority is to be determined under the Mohammedan Law i.e., on attaining puberty.¹⁵⁷

Remission can be made at any time after marriage whether it has been consummated or not. The remission of dower can be made before or at the time of marriage.¹⁵⁸

Indian Majority Act does not affect the discretion of a person to act in the matter of marriage and dower', and as such a wife who has

155. *Nurannessa Vs. Khaje Mohd.*, ILR 47 Cal 537

156. *Hasnumiya Vs. Halimunnissa*, AIR 1942 Bom 128

157. *Qasim Hussain Vs. Bibi Kaniz*, AIR 1923 All 649; *Mazharul Vs. Abdul*, AIR 1925 Cal 322

158. *Ali Vs. Md.*, (1918) 41 Mad 1026; *Najmunnissa Vs. Serajuddin*, 1939 Pat 133

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

not attained majority according to the Act but has completed age of puberty may remit her dower.¹⁵⁹

If wife has not attained an age under the Indian Majority Act, even though she has attained puberty according to Islamic Law, she is not competent to relinquish her dower.¹⁶⁰

In a case it was held that wife was under great mental distress due to husband's death and remission made during such conditions cannot be said to be of her free consent.¹⁶¹

Actionable claim: As an actionable claim, it can be taken in execution of a decree like any other debt. It does not fall within the exception assignable properly created by section 6(e) of the Transfer of Property Act.¹⁶² The prohibition being absolute, any transfer in defiance of provisions is calculated to defeat its provisions and as such is void.¹⁶³

A wife has got every right to file a suit for recovery of dower and in such cases she would obtain a money decree against all property,

159. *Qasim Hussain Vs. Bibi Kaniz*, AIR 1932 All 649; *Mst. Khadija Begum Vs. Nisar Ahmad*, AIR 1936 All 887; Mulla, Section 291

160. *Najmunnissa Vs. Sirajuddin*, AIR 1939 Pat 133

161. *Hasnumiya Dadamiya Vs. Halmunnissa*, (1942) 44 Bom LR 126

162. *Saibanbi Vs. Mohamudulli*, AIR 1941 Nag 8

163. *Ameer Hassan Khan Vs. H. Mohd. Nasir*, AIR 1932 All 345

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

including the property of husband in her own possession, if any. Dower can be realized like any other debt.

Dower is an actionable claim and can be taken an execution of a decree like any other debt, and it will not fall within the exception assignable property created by Section 6(e) of the Transfer of Property Act, 1882.¹⁶⁴

It can be taken in execution of a decree like any other debt. It does not fall within the exception assignable property created by Section 6(e) of the Transfer of Property Act.¹⁶⁵

As an actionable claim it can be taken in execution of a decree like any other debt. It does not fall within the exception assignable property created Section 6(e) of the Transfer of Property Act.¹⁶⁶

Dower is not a secured Debt: A dower debt could not be co-owner is entitled to an equal share in the shared property. This position is different from a money debt, because owelty has a priority over a mortgage debt.

164. *Saibanbi Vs. Mahamud Ali*, AIR 1941 Nag 8

165. *Ibid*

166. *Ibid*

Chapter-IV* **DIFFERENT KINDS OF DOWER AND THEIR REALIZATION*

The dower is an unsecured debt, which is recoverable by the wife on her heirs from the husband on the event of his death, from his assets. Since it is a debt, she is free to relinquish the same. Such a relinquishment can be made conditionally.¹⁶⁷

While any heir of husband may claim a share in the property and a simultaneous claim of wife for dower debt, the wife would get a priority for satisfaction of her dower debt before any claim of legal heirs are satisfied.

Remedies which other unsecured creditors have in such a situation would equally be available to wife in case of transfer to wife in lieu of dower, no less no more.¹⁶⁸

The dower debt of Mohammedan widow is not, properly speaking a charge upon the property of her husband, and the interest which she has in the property in her possession in lieu of dower debt is therefore an interest restricted in its enjoyment to her personally within the meaning of Section 6 (d) of the Transfer of Property Act, and as such is not capable of alienation.¹⁶⁹

167. *Hasina Bano Vs. Alam Noor*, 2007 Raj 49

168. *Ghiasuddin Babu Khan Vs. C.I.T., AP.*, 1985 Tax LR 1058

169. *Zobair Ahmad and another Vs. Jainandan Prasad Singh*, AIR 1960 Pat 147 at p. 148

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

A widow or divorcee is entitled to compensation for bearing to enforce her right of the dower-debt and such compensation is in the form of interest on the principle amount of the dower.¹⁷⁰

A widow must sue for recovery of the entire dower debt due to her at one time she cannot afterwards sue for the balance.¹⁷¹

The dower cannot be called a loan, as there has been no advance according to the provisions of U.P. Agricultural Relief Act.¹⁷²

A wife is not liable to be displaced by happening of any event not even her own death, because her heirs can claim the money if she dies and it is a debt within the meaning of Section 9(1)(b) of the Provincial Insolvency Act.¹⁷³

If there are no other creditors for outstanding debts against the husband then dower debt would be recoverable before any other legacies are paid.¹⁷⁴

On the death of husband, dower debt can be recovered from his heirs, and widow like any other creditor, institute a suit for her dower and can obtain decree against the assets of her husband.¹⁷⁵

170. *Hamira Bibi Vs. Zubaida Bibi*, (1916) 43 IA 294

171. *Kaneez Fatima Begum Vs. Ran Nanda Dhar Dube*, AIR 1923 All 331

172. *Rehana Khatun Vs. Iqtidaruddin*, AIR 1943 All 134

173. *Bibi Janbi Vs. Abbar Ali*, AIR 1941 Nag 167

174. *Nawab Begum Vs. Hossain Ali*, AIR 1937 Lah 589

175. *Zamin Ali Vs. Azizunnissa*, AIR 1933 All 329

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

A dower debt could not be presumed to be similar to owelty, where a co-owner is entitled to an equal share in the shared property. This position is different from a money debt, because owelty has a priority over a mortgage debt.¹⁷⁶

Discharge of claim of dower: A Muslim may discharge his duty to satisfy claim of dower before or after it becomes due, if the dower has not already been remitted by wife, in following manner:

- (i) **Cash payments:** A husband may discharge his duty to pay dower if he pays in cash either the whole amount or in parts. If simple payments were made in varying amount from time to time by the husband but it was not allocated towards dower, neither the wife had accepted those amounts as dower, then these payments could not be said to have satisfied the dower debt. As such the amount or amounts paid should be expressly told to be towards satisfaction of dower debt.

A payment for satisfying dower debt of a minor or insane wife may be made to her, to her father, grandfather or other guardian.

A wife is not liable to be displaced by the happening of any event, not even her own death, because her heirs can claim the money if she dies

176. *Hasan Bukhari Vs. Madan Chetty*, AIR 1956 AP 87

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

and it is a debt within the meaning of Section 9 (1) (b) of the Provincial Insolvency Act.¹⁷⁷

A Muslim widow's claim for dower is a simple money claim though that decree may be executed against the husband's property.¹⁷⁸

- (ii) **In lieu of cash payment:** Such types of transfers are called *Hiba-bil-Ewaz*, where husband transfers a property to satisfy a claim of dower. A Muslim marriage is a contract of which dower is a consideration and a transfer in lieu of dower is legal.¹⁷⁹ Such transfer in lieu does not affect Section 53 of the Transfer of Property Act, which is a separate provision from that of Islamic Law.¹⁸⁰
- (iii) **Lieu of dower after death of husband:** After death of the husband widow's right to dower accrues and she is entitled to retain the possession of husband's property. If obtained lawfully and without force, may continue to retain the possession and it is called 'widow's right of retention'. If dower remains unpaid.¹⁸¹

Her right for retention of property for unpaid dower does not create a charge, mortgage or lien in the property. In the same case it

177. *Bibi Janbi Vs. Abbas Ali*, AIR 1941 Nag 167

178. *Abdul Rahman Khan Vs. Inayati Bibi*, AIR 1931 Oudh 63; *Durga Das Vs. Mst. Hanifa Begum*, AIR 1940 Oudh 104

179. *Suburannessa Vs. Sabdu Shaikh*, AIR 1934 Cal 693

180. *Har Pd. Vs. Mohd. Usman Khan*, AIR 1943 All 2; *Bibi Kubra Vs. Jainandan Prasad*, AIR 1955 Pat 270; *Ameer Ali*, 1-211

181. *Mirwahidalli Vs. Rashid Beg*, AIR 1951 Bom 22

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

was held that if she loses possession, the special right of retention is lost and she is at par with other unsecured creditors.

In case a widow is in exclusive possession of her husband's estate, other heirs are entitled to demand an account for rents and profits received by her out of that property. In such a case widow would be entitled to compensation in the shape of interest on the dower debt.

When the widow is retaining the possession, if she is dispossessed unlawfully, she may bring a suit for possession of the property within the limitation period provided by Limitation Act. Widow is also entitled to bring a suit for recovery of dower against other heirs, even though she is in possession of property, but in that case the widow has to surrender the possession she is holding in lieu of her dower debt.

In case a widow is in exclusive possession of her husband's estate, other heirs are entitled to demand an account for rents and profits received by her out of that property.¹⁸²

182. *Shaikh Salma Vs. Mohd. Abdul Kadar*, AIR 1961 AP 428

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

The right of retention accrues only on the death of husband or on divorce.¹⁸³

If a widow gets possession of the property and dies, her heirs are entitled to retain possession as widow's lien is heritable and transferable.¹⁸⁴

However, the Privy Council has expressed some doubt whether the widow can assign either her dower or her right to hold possession.¹⁸⁵

In *Kapoor Chand Vs. Kadar Unissa*¹⁸⁶ the Supreme Court has laid down the three propositions:

- (a) The widow is like any other creditor of the husband and cannot therefore; claim any priority for the dower debt over other creditors.
- (b) The widow's claim for dower debt has priority over the claims of heir, and
- (c) The heirs of the deceased husband are not personally liable for the dower-debt of the widow; the amount can be realized rateably from their share in the estate.

183. Mulla Section 299

184. *Cooverbai Vs. Hayabi*, AIR 1943 Bom 372

185. *Maina Bibi Vs. Vakil Ahmad*, AIR 1925 PC 63

186. (1959) SCR 747

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

Where the husband had not specifically hypothecated his property for the dower debt, the widow's possession gave her no right as against a purchaser in execution of a decree for sale passed on a mortgage executed by her husband.¹⁸⁷

The lien which a Mohammedan widow has over the estate of her deceased husband for her unpaid dower is a purely personal one and does not descend to her heirs, although the right to the dower itself passes to them by succession. It follows, therefore, that they cannot take possession of the husband's estate under the claim for dower.¹⁸⁸

A purchaser of a deceased husband's estate from a Mohammedan widow, in possession thereof pending payment of her dower, was not entitled to plead non-satisfaction of her dower debt to a claim by her husband's heirs for their share of his inheritance, as the widow's right to dower was personal to herself, and did not pass to a purchaser of the estate.¹⁸⁹

187. *Ameer Ammal Vs. Lankara Narayan Chatty*, (1901) IL 28 Mad 658

188. *Hadi Ali Vs. Akbar Ali*, (1898) IL 20 All 262; *Muzaffar Ali Khan Vs. Parbati*, (1907) IL 29 All 640

189. *Ali Muhammad Khan Vs. Azizullah Khan*, IL 6 All 50; See also *Ghufoorun Bibi Vs. Mustukedeh*, 2 Agra 300 and *Azeemun Vs. Asgar Ali*, 2 Agra Part II, 167

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

But a widow in possession of her husband's estate pending was unascertained, but the widows were in possession of their deceased husband's estate in satisfaction of their *Mahr*, they had a lien over it as long as any portion of the dower remained unsatisfied.¹⁹⁰

Where, however, she has obtained actual and lawful possession of the estate of her husband, under a claim to hold it for her dower, she will be entitled to retain possession until the debt is satisfied, with the usual liability for account to the heirs.¹⁹¹

If she omits to put forward her claim for dower and assents to a person taking a legal she cannot afterwards retract her assent.¹⁹²

Under the Mohammedan Law, there is no hypothecation without seisin, and therefore a widow has no absolute lien over any specific property of her deceased husband so as to enable her to follow it, as in the case of a mortgage, into the hands of a bonafide purchaser for value. As stated already, the widow's claim for dower is only a debt against

190. *Ahmed Hussain Vs. Mussamut Khadija* (1868) 3 BLR AC 28 note; 10 WR 369

191. *Mussamat Beebee Bachun Vs. Sheikh Hamid Hussain* (1871) 10 BLR PC 45; SC 14 MIA 398; See also *Amanatunnissa Vs. Bashirunnissa* (1894) IL 17 All 77; *Muhammad Karimullah Khan Vs. Amani Begum* (1895) IL 17 All 93

192. *Reza Hossein Vs. Ifatounnissa* (1873) 24 WR 564

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

the husband's estate and has priority over legacies and the rights of heirs.¹⁹³

Remission of dower on condition – A wife has discretion of remission of her dower (besides provided under Article 9) in lieu of annuality of marriage.¹⁹⁴

It is open to a lady to relinquish her entire dower debt in whatever claim she had on account of the dower debts against the heirs of her husband.¹⁹⁵

The wife has the power to relinquish her whole dower or any portion of it in favour of her husband or his heirs only if the following conditions are fulfilled:—

- (i) **Time of Remission (Rule 95(i))** – Remission can be made at any time after marriage whether it has been consummated or not. No remission of dower can be made before or at the time of marriage.¹⁹⁶

193. *Wahedunnissa Vs. Shubratun* (1870) 6 BLR 54

194. *Khadija Begum Vs. Nisar Ahmad*, AIR 1936 Lah 887; *Gulam Mohd. Vs. Gulam Hosain*, AIR 1932 PC 81

195. *Ram Prasad Singh Vs. Mst. Khudayatul Kubra*, AIR 1948 Pat 163

196. *Ali Vs. Md.*, (1918) 41 Mad 1026; *Najmunnissa Vs. Serajuddin*, 1939 Pat 133

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

- (ii) **Capacity for Remission (Rule 95(ii))** – Only an major (adult) wife with sound mind can make a remission. Regarding the age of majority, the Courts have different opinions. According to Madras and Patna High Courts the age of majority for the purpose of making remission should be 18 years as under the Indian Majority Act, 1875. But the Allahabad and Calcutta High Courts hold the opinion that the age of majority is to be determined under the Mohammedan Law i.e., on attaining puberty.¹⁹⁷
- (iii) **Consideration (Rule (iii))** - Remission can be made even without consideration.
- (iv) **Free Consent (Rule 95(iv))** – Remission should be made by the wife with her free consent. Consent is free when there is no coercion or undue influence. When the wife is under mental tension, such as her husband is on death-bed or has died, at that time if she makes a remission, her consent cannot said to be free.¹⁹⁸

197. *Qasim Hussain Vs. Bibi Kaniz*, AIR 1923 All 649; *Mazharul Vs. Abdul*, AIR 1925 Cal 322
198. *Hasuuniya Vs. Halimunnissa*, AIR 1942 Bom 128

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

A remission of dower debt maybe made conditionally, for example on execution of a Waqfnama.¹⁹⁹

It is open to a lady to relinquish her entire dower debt in whatever claim she had on account of the dower debts against the heirs of her husband.²⁰⁰

A wife has discretion of remission of her dower in lieu of annuity of marriage.²⁰¹

Standing surety for dower – Under the Muslim Law it is valid for person, who is guardian of, whether husband or wife or both, to stand surety for payment of dower, although the wife may be minor. Even a stranger may make a contract for surety ship for payment of dower.²⁰²

The consent to become a surety must be specific and express as where a father is his consent for marriage only that does not automatically make him a surety for payment of dower debt.²⁰³

199. *Latafat Husain Vs. Hidayat Husain*, AIR 1936 All 573

200. *Ram Prasad Singh Vs. Mst. Khudayatul Kubra*, AIR 1948 Pat 163

201. *Khadija Begum Vs. Nisar Ahmad*, AIR 1936 Lah 887; *Gulam Mohd. Vs. Gulam Hosain*, AIR 1932 PC 81

202. *Smt. Fatima Vs. Ahmad Ali*, AIR 1937 PC 121

203. *Mohd. Siddiq Vs. Sahabuddin*, AIR 1927 All 364

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

In Shia Law when his father contracts the marriage of an infant son and the child is poor, the obligation rests entirely on the father, and in the event of his death must be discharged out of the whole of his property whether child should arrive at maturity and become wealthy or die before it.²⁰⁴

It is valid for a person who is guardian (whether-for husband or wife or both) to stand a surety for payment of dower although the wife may be minor.²⁰⁵

Under Shia Law when marriage of an infant son is contracted by his father and child is poor, the obligation rests entirely on the father, and in the event of death of father the obligation would be discharged out of whole of his property whether child should attain maturity or even die before it.²⁰⁶

Where a father is giving his consent for marriage only that does not automatically make him a surety for payment of dower debt.²⁰⁷

Under the Muslim Law it is valid for a person, who is guardian of, whether husband or wife or both, to stand surety for payment of

204. *Syed Sabir Hussain Vs. S. Farzand Hasan Khan*, AIR 1938 PC 80

205. *Mst. Fatima Bibi Vs. Lal Din*, AIR 1937 Lah 45

206. *Sayed Sabir Husain Vs. Farzand Hasan Khan*, AIR 1938 PC 80

207. *Mohd. Siddiq Vs. Sahabuddin*, AIR 1927 All 364

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

dower, although the wife may be minor. Even a stranger may make a contract for surety ship for payment of dower.²⁰⁸

Effect of apostasy- The effect of dissolution of marriage under a decree of the Court is regulated by Statue. According to Section 5 of the Dissolution of Muslim Marriages Act, 1939; a married Muslim woman shall have same rights in respect of dower after dissolution of marriage under the Act as she may have (after dissolution of marriage, by way of talaq, faskh, etc. under the Muslim Law. Hence, a Muslim woman whose marriage is dissolved under the aforesaid Act on the ground of apostasy of the husband is entitled to dower. The dissolution of marriage under the Act, even though made after apostasy of the wife, does not take away her right to dower and she is entitled to deferred (or half) dower even if the marriage is not consummated.

If a valid marriage has been dissolved (on account of the husband such as Divorce or Apostasy or any other act) before consummation of marriage:

208. *Smt. Fatima Vs. Ahmad Ali*, AIR 1937 PC 121

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

- (a) The wife is entitled to receive one half of the specified dower settled at the time of marriage (settled before or at the time or after marriage under the Shia Law) excluding additions.
- (b) Where the dower is settled after the solemnization of a valid marriage and the marriage is dissolved (on account of husband) before consummation of marriage, such a apostasy then the wife is entitled to a present only (under the Sunni Law), and to no portion of the dower.
- (c) If a valid marriage has been dissolved (on account of the husband such as divorce or apostasy or any other act) before consummation of marriage and the dower is not specified the wife is entitled to a present only and to no portion of the dower.
- (d) Where a valid marriage has been dissolved by the husband or the wife in exercise of an option of repudiation, before consummation of marriage the wife would get nothing.
- (e) If a valid marriage has been dissolved, on account of wife's apostasy or adultery before consummation of marriage, the wife would get nothing.
- (f) The amount of present is determined on the basis of the social position, status and means of the husband.

Payment of *Mahr* on death of either party –

- (i) Under Sunni Law, on the death of either party to a valid marriage, irrespective of the fact whether the marriage is consummated or not the wife is entitled to receive either

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

specified dower (including additions) settled before or at the time of or after marriage or proper dower if the dower is not specified.

- (ii) Under the Shia Law, if either party to marriage dies before consummation and no dower has been specified, the wife would get nothing.

In the case of valid marriage full specified dower or if it has not been specified then proper dower whether the marriage has been consummated or not because of the death of the husband or the wife marriage is rendered complete and everything becomes established and confirmed by its completeness.²⁰⁹

Under the Sunni Law –

- (i) In the case of a valid marriage, whether the consummation of marriage has taken place or not, if the husband or the wife dies, the wife (If dies then her heirs) is entitled to full specified dower including prompt and deferred, which also includes any additions made after marriage. The Specified Dower may be settled either before marriage or at the time of marriage or even after marriage. (Rule 91 (i)).

209. *Malik Iftikhar Wali Vs. Sarwari Begum*, AIR 1929 All 369

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

- (ii) In the case of a valid marriage whether consummated or not if one of the party to marriage dies, and no dower is specified, then the wife is entitled to proper dower under the Sunni Law. (Rule 91(1))

Under the Shia Law, if either party to marriage dies before consummation and if the dower is not settled, the wife is not entitled to anything neither dower nor present and if it has been agreed to be specified later, then she is entitled to one half of dower [Rule 91(ii)].

Jurisdiction of Court - The jurisdiction of the Court for filing the suit for dower is settled according to the cause of action, i.e., if an agreement for dower at the time of marriage or a Dower-Deed is made or executed. The place where the agreement is made, or the Dower-Deed is created at the time of marriage will be the within jurisdiction of the Court where the suit will lie. The agreement between the husband and wife for payment of dower undoubtedly be a part of the cause of action for maintaining a suit for its recovery and the place where such agreements entered into would be a place where a part of cause of action for such suit arises.²¹⁰

210. *Smt. Nasra Begum Vs. Rijwan Ali*, AIR 1980 All 118 at p. 120

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

The Family Court has no jurisdiction to entertain a petition for sum of *Mahr* or dower filed by divorced Muslim women. Only Magistrate concerned can entertain such petition.²¹¹

The absence of any power to Court for decreasing amount of dower has been judicially deplored.²¹²

The plea that suit for restitution of conjugal rights filed by wife, is not maintainable under the Mohammedan Court can be raised before Trial Court and not before Revisional Court.²¹³

If the marriage was celebrated abroad, and the parties were resident in England, even then the English Courts will refuse to recognise a divorce not obtained through a validly constituted Court of Justice.²¹⁴

Miscellaneous Cases: In case of registered deed under Article 62 of the Limitation Act period of Limitation is 12 years if immovable property is hypothecated.²¹⁵

211. *Anjuon Hasan Siddiqui Vs. Smt. Salma B.*, AIR 1992 All 322

212. *Mohd. Sultan Begum Vs. Sarajuddin*, AIR 1936 Lah 183

213. *W. Sirajuddin Vs. Shaziya*, AIR 2003 Kant 224:2003 (2) DMC 618

214. *Shaw Vs. Gould* (1868) LR 3 HL 55

215. *Mazharul Vs. Azimuddin*, AIR 1923 Cal 507

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

If Talaq once becomes effective the mere fact that the parties lived together and the talaq again given would not prevent the running of time from the date of first talaq.²¹⁶

In case of consummated marriage, the dower will not be lost in any case even by apostasy or other misconduct of wife such as committing adultery or concealing illicit pregnancy or even by the murder of husband by her.²¹⁷

The widow's right of retention is to some degree analogous to mortgage yet there is no real analogy between the two.²¹⁸

If it is admitted that dower was specified, but there is no satisfactory evidence of it, the burden of proof being wife only, the amount admitted by the husband to have been settled may be allowed.²¹⁹

The widow is entitled to equitable compensation by way of interest on dower, as she is creditor of the husband.²²⁰

216. *Mst. Hayat Khatun Vs. Abdullah Khan*, AIR 1937 Lah 270

217. *Kulsambi Vs. Abdul Kadir*, AIR 1921 Bom 205

218. *Mst. Maina Bibi Vs. Vakil Ahmad*, AIR 1925 PC 63

219. *Mst. Bhuri Vs. Asgari*, AIR 1926 Lah 458

220. *Mst. Maimunia Vs. Sarafatullah*, AIR 1931 All 403

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

The Courts have, however, some discretion in determining whether interest should be allowed in case of dower.²²¹

The Privy Council has expressed some doubt whether the widow can assign either her dower or her right to hold possession although the question was not decided.²²²

A widow must sue for recoveries of the entire dower debt due to her at one time she cannot after-wards sue for the balance.²²³

A post-nuptial agreement of dower requires the concurrence of both the parties i.e., an offer by husband and acceptance by the wife or her guardian.²²⁴

Where a suit for claim of dower debt has to be filed against heirs of husband, heirs are not personally liable for dower debt, but each heir is liable for such debt to the extent of his share in the estate. Thus, if a suit is to be filed for dower claim it must be filed against all heirs.²²⁵

As the claim of dower debt and its relief granted would be a simple money claim, such decrees may be executed against the property

221. *Niwasi Begum Vs. Dilafroz*, AIR 1927 All 39

222. *Maina Bibi Vs. Vakil Ahmad*, AIR 1925 PC 63

223. *Kaneez Fatima Begham Vs. Ram Nanda Dhar Dube*, AIR 1923 All 331

224. *Mst. Hakimbi Vs. Mir Ahmad*, AIR 1931 Sind 17

225. *Imperial Bank of India Vs. Bibi Sayeedan*, AIR 1960 Pat 132

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

of the husband and the property cannot be charged against any specific portions.²²⁶

In a suit filed by widow for her dower debt, a decree should be passed against the assets left by the husband and not against those personally into whose hands those assets fall.²²⁷

A decree for dower debt should not be passed to create a charge on the property, but if the decree is allowed to become final between the parties. It would create a charge.²²⁸

The liability to pay deferred dower binds the husband during his lifetime and his property after his death and if the wife predeceases the husband, the dower would become due immediately and will not be postponed till the death of the husband.²²⁹

The Court would not ordinarily create a charge on any property while passing a decree for dower; it can pass a simple money decree.²³⁰

A Muslim marriage is a contract of which dower is a consideration and a transfer in lieu of dower is legal.²³¹

226. *Abdul Rahman Vs. Inayat Bibi*, AIR 1931 Oudh 63

227. *Sultan Nachi Vs. Salamar Bibi*, AIR 1938 Mad 25

228. *Syed Qasim Hussain Vs. Habeebur Rahman*, AIR 1929 PC 174

229. *Meer Mehr Alij Vs. Mst. Amanee*, 11 WR 212

230. *Mst. Ahmadi Vs. Abdullah*, AIR 1934 Oudh 437

231. *Suburannessa Vs. Sabdu Shaikh*, AIR 1934 Cal 693

Chapter-IV DIFFERENT KINDS OF DOWER AND THEIR REALIZATION

However, such transfer in lieu does not affect Section 53 of the Transfer of Property Act, which is a separate provision from that of Islamic Law.²³²

If simple payments were made in varying amounts from time to time by the husband but it was not allocated towards dower, neither the wife had accepted those amounts as dower, then these payments could not be said to have satisfied the dower debt.²³³

The talaq has not been pronounced thrice through the letter and as it is not a triple talaq. The said talaq is not valid.²³⁴

Attempt for mediation although encouraged but its absence would not invalidate talaq.²³⁵

Presence of two witnesses of the time of pronouncing talaq makes it a valid talaq. Even consent of wife for talaq is not necessary.²³⁶

In addition to above it has also been noticed and observed from the practices prevailing in the Muslim society in India that husbands generally use to take the plea in cases of payment of prompt or deferred

232. *Har Pd. Vs. Mohd. Usman Khan*, AIR 1943 All 2; *Bibi Kubra Vs. Jainandan Prasad*, AIR 1955 Pat 270; *Ameer Ali*, 1-211

233. *Nawab Mirza Mohammad Sadiq Ali Khan Vs. Nawab Fakhr Jahan Begum*, AIR 1932 PC 13

234. *M. Shahul Hameed Vs. A. Salim*, AIR 2003 Mad 162;2003 (1) Mad LW 183 (Mad)

235. *Banu Vs. Kutubuddin Sulemanji Vimomwala*, 1996 (1) Civil LJ 125 (Bom)

236. *Ibid*

***Chapter-IV* DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

dower that he has already presented some valuables like gold ornaments or has transferred some immovable property to his wife in lieu of her claim of dower. Keeping in view the observation of different courts on the issue, it may be deduced that if such gifts and property are not accepted by the wife in lieu of her claim of dower then such gifts and transfer of properties cannot be said to have satisfied her claim for dower.

The researcher has an opportunity to conduct an intensive survey of the related cases of dower in various High Courts and the Supreme Court of India, whereby it has been found that the cases on the said subject were quite small in number, which have already been discussed in the preceding chapter. Hence, the researcher ventured to conduct the random survey of the official records available in the District Courts of Aligarh and Agra. Having tried to exhaust all the possible efforts, the researcher managed to find out three important cases decided in 2013 namely (i) *Salma Begum Vs. Azmat Ali* (2013) (ii) *Saima Aziz Vs. Muslim Khan* (2013) (iii) *Syed Humaira Vs. Syed Imran Agha* (2013) (the copies of which have been annexed herewith). In all the above cited cases, the wife had filed an application seeking the recovery of dower from her

Chapter-IV **DIFFERENT KINDS OF DOWER AND THEIR REALIZATION**

husband under Section 3 and 4 of the Muslim Women (Protection of the Right and Divorce) Act, 1986 wherein the Court unanimously passed an order to pay the amount of dower which is specified in the Nikahnama along with other claims. It is also pertinent to mention here that in all the above cited cases, the Muslim women had filed the instant suits only after the dissolution of their marriages.

CHAPTER – V

MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

- The Approach of Shariah law on Mahr and Dissolution of Muslim Marriage
- Dissolution of Muslim marriage Act, 1939
- Mahr, Nafaqah & Mata': Nature and Inter-Relationship
- Muslim Widow's Right to retain possession of husband's estate in lieu of dower
- Salient Features for right of retention

Chapter-V* **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE*

Nature demands that men and women lead their lives together. The ideal way of leading such a life is, according to the Shariah within the bonds of marriage. Once a man and a woman are tied together in the bonds of matrimony, they are expected to do their utmost, till the day they die to honor and uphold what the Quran calls their firm contract, or pledge. However, it sometimes happens, with or without reason that unpleasantness crops up and goes on increasing between husband and wife, with no apparent indication of their being able to carry the relation smoothly and their marriage has become devoid of love and affection, in such circumstances Shariah law desires that disgruntled spouse should separate from each other by dissolving the marriage. In such a case, the best strategy according to the Quran is to introduce a third party who will act as an arbitrator. But if the arbitration fails then there are various commandments in Quran and in the Hadiths regarding divorce. The Prophet (P.B.U.H.) considered it as being the most hateful of all the lawful things (*abghad-ul-mubahat*) in the eyes of God, and said that when it does take place, it should be done in an atmosphere of goodwill. In no way should one harbour ill will against the other.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

Since Islam has recognized the extra-judicial mode of marriage dissolution as a general policy and judicial one only as an exceptional measure. This is demanded by circumstances like fault or guilt of either or both the parties. The dissolution of marriage in practice has acquired different forms. The Muslim women's rights to *Mahr* can be determined with reference to respective form of marriage dissolution followed in a particular case.

Below is given an account of the various existing forms of marriage dissolution and the entitlement to *Mahr* in each case by the divorced woman.

The Approach of Shariah law on *Mahr* and Dissolution of Muslim Marriage

Cases/Circumstances:

The Act of bringing marriage tie to an end by a unilateral action of the husband is called the talaq and that under the unilateral action of the wife, who may have reserved in the marriage contract an authority delegated by the husband to pronounce a divorce is called talaq-tafwidh. As regards the position of *Mahr* in these cases, unless there is an agreement to the contrary, the wife will be entitled to-

Chapter-V **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE**

a) In lawful marriages:

- (i) If consummated¹ – the whole 'specified' *Mahr*; when *Mahr* is unspecified, the 'proper' *Mahr*;
- (ii) If unconsummated – half of the specified *Mahr* if unspecified,² only *mata*³

b) In irregular marriages (recognized by Hanafi Law):

- i) If consummated – 'specified' or 'proper' *Mahr* whichever is less;
- ii) If unconsummated – no *Mahr*;
- iii) If consummated 'presumptively' only – no *Mahr*.

In case of irregular marriages, 'valid retirement' is not equated with actual consummation for the purposes of *Mahr*.⁴

Cases of khula'

Termination of marriage by the husband at the request of the wife is called *khula'*. It literally means 'to put off'. Here the husband lays down his right over his wife at her request when she gives or agrees to give *iwaz* (some consideration) to the husband for her release from the marriage tie.

1. Consummation includes 'Presumptive' consummation under Hanafi, Maliki and Hanbali Laws: Ibn Qudamah Al Mughni, Vol. VI, P. 654 (Cairo, 1367 AH).
2. This rule was applied by Madras High Court in *Tajbi Vs. Nattar Shariff*, AIR 1944 Mad. 888.
3. *Mata'* is a benefit to be given to the wife, which under Hanafi law cannot be more than half of *Mahr*.
4. Maulana Ashraf Ali Thanwi, *Bihishti Zewar*, Vol. IV, P. 15.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

The Quran provides:

*Then if you fear that they (the husband and the wife) cannot keep within the limits of Allah, there is no blame on them for what she gives up to become free thereby.*⁵

To the same effect is the famous hadith when Prophet (S.A.W.) asked Thabit Ibn Qays to release his wife Jamila, daughter of Abdullah B. Ubbay b. Salut, who had requested for that, in return of the orchard which he had given to her as *Mahr*.

It is, therefore, open to the spouses to agree to *khula'* on the condition that the wife surrenders or returns her *Mahr* to the husband. Hence, whatever may in law constitute *Mahr* in marriage can also form the *iwaz* in *khula'* and the wife may agree not to claim from the husband her hitherto unpaid *Mahr* or any part thereof which she will lose accordingly. It can, however, be made an express condition of *khula'* that the wife's *Mahr* or a portion of it shall remain payable by the husband. If the whole *Mahr* has already been paid to her, she may agree to make a specified payment to the husband as *iwaz* (which may or may not be regarded as the return of *Mahr*). Where an agreement of *khula'* is silent on the question of *iwaz* there is difference of opinion

5. Al-Quran, II:229.

Chapter-V **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE**

among Hanafis about the husband's liability for payment of *Mahr* to the wife. According to Imam Abu Hanifa the husband's liability for *Mahr* is discharged, but according to both of his disciples, it is not.⁶

Different opinions exist about husband's liability for payment of wife's *Mahr* and wife's liability for its return if it has already been paid to her. Where the spouses settle *iwaz* other than *Mahr* and no mention has been made about the *Mahr*, the following results will follow:

- a) If the marriage has been consummated and the whole *Mahr* has been paid to the wife, she shall be entitled to retain it according to the unanimous view of Abu Hanifa, Imam Muhammad and Abu Yusuf. The husband will get only the consideration agreed upon.⁷ But if the *Mahr* has not been paid to her, then according to Abu Hanifa, she is not entitled to claim the *Mahr* because, according to him, *khula'* puts an end to the rights which the spouses have against each other except the wife's maintenance and residence during her *iddat*. But according to Abu Yusuf and Imam Muhammad the wife shall be entitled to claim it from her husband because it becomes due if the marriage has been consummated.⁸

6. Hedaya, *Fatawa-i-'Alamgiri* and *Bihishti Zewar* refer to the former opinion as the law but the Courts usually apply the concurrent opinion of the disciples where both of these differ from the great Imam: (i) *Agha Ali Khan Vs. Altaf* (1982) 14 All 429 (ii) *Abdul Kadir Vs. Salima* (1886) 8 All, 149.

7. *Fatawai Qadi Khan*, Vol. III, p. 256 (Kanpur, 1310 AH)

8. *Ibid*

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

- b) If the marriage has not been consummated and the whole *Mahr* has been paid to her, according to Abu Hanifa the husband will not be entitled to the return of any portion of *Mahr*. He shall, of course, take the consideration that may have been agreed upon. But according to his disciples, the wife shall have to return half of *Mahr*, to the husband and will be entitled to keep half of it.⁹
- c) If the marriage has not been consummated and *Mahr* has not been paid to her, then according to Abu Hanifa no amount of *Mahr* shall be due to her. She shall not be entitled to get her *Mahr* or any portion of it from her husband and shall pay to him the consideration agreed upon.¹⁰ According to Abu Yusuf and Imam Muhammad, the wife shall be entitled to get half of her *Mahr* from the husband.¹¹ The consideration agreed upon has, of course, to be paid by the wife to the husband in each case.

If the husband divorces his wife by *khula'* in consideration of her *Mahr* and in case the marriage has not been consummated and the whole *Mahr* has been paid to the wife, then the husband shall be entitled to its return by the wife. If it has not yet been paid to her, the husband's liability for the same shall cease.¹² There are two opinions expressed by Hanafi jurists. According to one, the same rule shall apply as held by abu Hanifa regarding *Mahr* in *khula'*. But according to

9. Ibid
10. Ibid
11. Ibid
12. Ibid

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

second opinion which is generally believed to be correct, the same rule shall apply as laid down by Imam Muhammad and Abu Yusuf.¹³

According to the Maliki view if the marriage has not been consummated and the parties settle *khula'* for a specified consideration, the wife shall have to pay the specified consideration and her right to get *Mahr* shall get extinguished. She shall not be entitled to get the whole or any portion of it.¹⁴

According to Shafi'i view, if the spouses agree to a *khula'* for a particular consideration and the marriage has not been consummated, the wife shall be entitled to half of the *Mahr*. If the whole *Mahr* has been paid to her, she shall have to return half of it; while if it has not been paid to her, the husband has to pay half of *Mahr* to her.¹⁵

According to Imam Ahmad Ibn Hanbal the right to *Mahr* is not lost in consequence to the *khula'* and the husband remains liable for its payment if the same has not already been paid to the wife.¹⁶

Cases of Mutual Consent (*mubara'a*)

Where the agreement to dissolve marriage emanates from a concurrent desire of both the spouses, the divorce is called *mubara'a*

13. Ibid

14. Sunan, al Mudawwant al Kubra, Vol. V, P. 21 (Cairo, 1323 AH)

15. Ibn Qudamah, Al-Mughni, Vol. VII, P. 56 (Cairo 1367 AH)

16. Ibid

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

(that is by mutual consent). In such a case *iwaz* may or may not be specified. Where the agreement of *mubara'a* is silent on the question of *iwaz* the wife's entitlement to *Mahr* is to be determined as follows:

- i) according to Imam Abu Hanifa and Imam Abu Yusuf the presumption is that the husband's liability relating to *Mahr* is discharged;
- ii) in the opinion of Imam Muhammad al-shayabani the *Mahr* is not discharged.¹⁷

Cases of faskh

The termination of marriage by the qadi, either on his own initiative or at the instance of the wife or a third person is called *faskh*. In cases of marriage dissolution by *faskh* for determining the position of *Mahr* broadly the rules determining the position of *Mahr* in the cases of *talaq*, *khula'* etc. apply with modification having reference to the defects of the spouses, consummation etc.

Under Sunni law a wife shall get the whole of her *Mahr* if the marriage has been consummated or under the Hanafi, Maliki or Hanbali laws if there has been a 'valid retirement' irrespective of the

17. The majority opinion has been supported by Maulana Ashraf Ali Thanwi, *Bihishti Zewar*, Vol. IV, p. 40.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

fact whether it is dissolved by the husband or the qadi.¹⁸ But in the absence of consummation or valid retirement she shall be entitled to half of the *Mahr* when marriage is dissolved by the husband.¹⁹ If dissolved by the qadi on account of a defect in the wife, she shall not be entitled to get any *Mahr* whatsoever.²⁰

Under the Shia law if a marriage is cancelled before consummation either by the husband or the wife on account of the specified defects in the other, no *Mahr* shall be payable to her.²¹ This is subject to one exception, namely when the marriage is cancelled by the wife on account of husband's impotency, she shall be entitled to get half of her *Mahr*.²²

If the marriage is cancelled either by the husband or by the wife after its consummation, the wife shall get her full *Mahr*.²³

In a consummated marriage the unpaid *Mahr* ordinarily becomes payable when the marriage is dissolved. If an unconsummated marriage is dissolved by the act of the wife no *Mahr* is payable, where

18. Sharaf al Din al Maqdisi, *Al-Iqna* Vol. III, p. 200 (Cairo, n.d.)

19. Ibid

20. Ibid

21. Syed Muhammad Sadiq, *Rawai-al-Ahkam*, P. 277 (Hyderabad 1897) Urdu Trans. of *Sharai al Islam* by Jafar b. Hasan.

22. Ibid

23. Ibid

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

the wife exercises her 'option of puberty' before consummating the marriage no *Mahr* is due. |

Where a marriage is dissolved on the ground of husband's impotency, if the marriage has not been consummated (under Hanafi law including 'valid retirement') half the *Mahr* is due if 'specified', if *Mahr* is not specified only *mata'* is due valuing under Hanafi law half of proper *Mahr*. In an irregular (*fasid*) Hanafi marriage, if it has been consummated (actually not presumptively) the specified or proper *Mahr* whichever is less, is due; in the absence of actual consummation no *Mahr* is due. Under the Shafi'i and Ithna Shari laws, when a wife annuls her marriage (unilaterally and extra-judicially), before its actual consummation, on the ground of husband's insanity or inability to provide maintenance, she cannot claim any *Mahr*, but if it has been consummated the whole *Mahr* becomes due.

To sum up when a marriage is dissolved by the Qadi on account of some defect in the wife her entitlement to *Mahr* will be:

- i) If unconsummated (actually or "presumptively") - no *Mahr*;
- ii) If consummated (actually or "presumptively") - whole *Mahr* payable

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

When the marriage is dissolved by either party due to other's defect (under Shia law) the position of *Mahr* will be:

- i) if an unconsummated marriage is cancelled either by the husband or the wife on account of specific defects (excepting husband's impotency) in the other – no *Mahr* is due to the wife;
- ii) in case of husband's impotency she shall be entitled to half of the *Mahr*;
- iii) if the marriage was consummated full *Mahr* shall be due.

When the dissolution of marriage takes place by the act of the wife, she will be entitled to, if the marriage was –

- i) unconsummated – no *Mahr*;
- ii) unconsummated and dissolved by exercising option of puberty by her – no *Mahr*;
- iii) unconsummated (actually or "presumptively") and dissolved on the ground of husband's impotency – if specified, half of the *Mahr* – if unspecified only *mata'* payable;
- iv) unconsummated and annulled by her under classical Shafi'i, or Ithna Ashari law on the ground of husband's insanity or inability to maintain her – no *Mahr*;
- v) consummated and annulled as in (iv) – whole of the *Mahr* payable;

Chapter-V **MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE**

- vi) an unconsummated irregular marriage is repudiated by the wife – no *Mahr* payable;
- vii) a consummated (actually, not by “presumption”) irregular marriage if repudiated by the wife – whole *Mahr* payable.

Cases of li'an

In case of li'an the entitlement of the wife to *Mahr* can be determined with reference to the following hadith:

Narrated Sa'ad bin Jubair:

I asked Ibn Umar, “what is the verdict if a man accuses his wife of illegal intercourse”. Ibn Umar said, “The Prophet (S.A.W.) separated (by dissolution of marriage) a couple of Bani al-Ajlan and said to them Allah knows that one of you two is a liar; so will one of you repent? But both of them refused, so he (S.A.W.) separated them by divorce. He again said, “what about the *Mahr* that I have given to my wife?” It was said, “You have no right to restore any money, for if you have spoken the truth you have also shared life with her and if you have told a lie, you are less rightful to have your money back.”²⁴

It can be inferred from this hadith that the position of women's right to *Mahr* where marriage is dissolved by li'an will be:

24. Mussand Imam Aizam, Kitab al-talaq, p. 273 (Deoband, 1967)

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

- i) if the marriage was consummated, the whole specified *Mahr* or proper *Mahr*, if it was unspecified;
- ii) if the marriage was unconsummated, under general Quranic law the half of the 'specified' *Mahr*; if *Mahr* was unspecified, only *mata'*.²⁵
- iii) If the whole or part of *Mahr* has already been paid, guidance may be taken from the Quranic principle given below:

Nor should ye treat them with harshness, that ye may take away part of the *Mahr* ye had given them; except where they have been guilty of open lewdness.²⁶

It may be pointed out that mere suspicion may not amount to open lewdness. It warrants strict interpretation. This principle will apply to both consummated and unconsummated and unconsummated marriages as the Quran is silent about any distinction in the respect.

Cases of *ila'*

Ila' is a kind of desertion in which the husband decided to keep away from the wife without divorcing her. If the husband actually keeps away from the wife and does not resume cohabitation till the expiry of four months, the law enables the wife to become free from the

25. II:236, 237

26. IV:19

Chapter-V **MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE**

marriage. In Hanafi law, the marriage is automatically dissolved by talaq; in Shafi'i and Ithna Ashari laws, the wife can sue for faskh.²⁷ Now where the marriage of a wife has dissolved through ila' her entitlement to *Mahr* will be the same as in case of talaq if the Hanafi law is applicable to the parties or it will be the same as in the case of faskh if the Shafi'i or Ithna Ashari laws are applicable to parties.

Cases of zihar

The word zihar is derived from 'zahr' (back). Zihar means "to oppose back to back". It is explained that when there is discord between the husband and the wife, they instead of remaining face to face towards each other turn their backs against each other. In the language of law it signifies a man comparing his wife to any of his female relation within such prohibited degree of relationship, whether by blood, fosterage or affinity, as renders marriage with her invariably unlawful. In such cases, the husband is expected to expiate and resume cohabitation. The wife also become entitled to call her muzahir husband to return to his matrimonial duties and on his failure to do so approach the qadi who shall force the husband either to perform the necessary expiation or divorce the wife. Some authorities have laid down the rule

27. Supra note 1, p. 107.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

that the qadi should give the husband three months time either to make expiation and to return to his wife or to divorce her. If the husband fails to do either, the qadi can use coercive measures to compel him to adopt one of the alternatives.²⁸ The general opinion is that the qadi cannot himself pronounce a divorce on behalf of the husband. However, in the subcontinent, if the husband continues to keep away from the wife, faskh may be sought by the wife under statutory law.²⁹

From the nature of zihar it is clear that if the husband chooses to divorce the wife, his liability for *Mahr* of the divorcee will be the same as that in talaq. But, if the marriage is dissolved by grant of faskh similar rules will apply, as discussed above.

Cases of khyar al-bulugh (option of puberty)

When the dissolution of marriage takes place by the exercise of 'option of puberty' and the marriage has not been consummated, the woman is not entitled to *Mahr*; but if the marriage has been consummated, she is entitled to her full *Mahr* irrespective of the fact whether the separation has taken place by her own option or by the option of her husband.³⁰

28. Jaffar b. al-Hassan, *Kitab Sharai al Islam*, p. 222 (Tehran, 1377); Abu al-Hassan al-Musawi, *Al Istibsar*, Vol. III, p. 389 (Najaf, 1956).

29. Section 2(ix) of the Dissolution of Muslim Marriages Act, 1939.

30. *Al-Fatawa al-Hindiyah*, Vol. II, p. 11 (Kanpur, 1349 AH)

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

Cases of irtidad or apostasy

If the marriage has been consummated or if under the Hanafi, Maliki and Hanbali laws there has been a 'valid retirement', the wife shall be entitled to her whole *Mahr* irrespective of the fact whether it is the husband or the wife who has left the fold of Islam.³¹

If a marriage has not been consummated or under the Hanafi, Maliki and Hanbali laws there has not been a 'valid retirement', the wife shall get half of the *Mahr* if it is the husband who has renounced Islam but she shall not be entitled to get any *Mahr* if it is she herself who has renounced the faith.³²

Cases of automatic dissolution of marriage

The automatic termination of marriage is called *furqah* (separation). In Islam marriage gets automatically dissolved on:

- i) the death of one of the spouses;
- ii) apostasy of one of the spouses;
- iii) under the Sunni law, on the fulfillment of a condition in the case of a conditional divorce; or
- iv) change of domicile in case of non-Muslims.

31. Ibn Abidin, *Radd al-Muhtar*, Vol. III, p. 402 (Cairo, 1318 AH)

32. *Ibid*

Chapter-V **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE**

If a marriage is dissolved by the death or for a cause imputable to the husband then it has, generally speaking, the effect of talaq or divorce on the ground that the dissolution of marriage has been brought about by the husband and he should be deemed to have divorced his wife. Thus, if the marriage is dissolved on the ground that the husband is impotent or insane or the like then the dissolution of the marriage will have the effect of talaq even though the marriage is dissolved by the qadi at the instance of the wife. The dissolution of marriage by or at the instance of a wife is called faskh (termination). If the marriage is dissolved due to a cause attributable to the wife then also it should have the effect of faskh or termination of the marriage by the wife. Thus if it is dissolved by the wife in the exercise of the option of puberty or by the qadi on the ground of some serious blemish in her, then it shall be deemed to be faskh by the wife.³³

It may be added here that the above is not an invariable rule of law and there are certain exceptions to it. Thus, if a marriage is dissolved on account of the apostasy of the husband or adoption of a domicile in dar al-harb when the wife resides in dar al-Islam, then the

33. Id. Vol. III, p. 315, Faskh is the termination of marriage by the qadi either on his own initiative or at the instance of the wife or any third person.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

dissolution shall be considered to be *faskh*, although the marriage is dissolved for a cause attributable to the husband.

The effect of both these methods, namely, *talaq* and *faskh* is the same as far as dissolution of marriage is concerned. The difference is in the extent of the husband's ability for payment of *Mahr* and the number of divorces affected.

Assorted Marriages

A marriage can be dissolved at the instance of certain near relations of the wife if she contracts a marriage for a *Mahr* which is less than the proper *Mahr* in her family or if the husband is otherwise unequal to the girl's family. *Mahr* is being treated as a criteria of inequality and such marriages between the unequals have been termed as ill-assorted marriages. By *Mahr* in this respect is meant the proper *Mahr* of the wife because there is no present liability for the payment of her deferred *Mahr*. There, however, exists a difference of opinion as to whether the ability to pay the wife's *Mahr* or maintenance is a condition of equality in marriage. Abu Yusuf does not hold it to be an essential condition on the ground that payment of *Mahr* can admit delay, but the

Chapter-V **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE**

payment of maintenance cannot be delayed.³⁴ But the generally accepted view is that the husband's ability to pay wife's *Mahr* is an essential condition of equality in marriage.³⁵

As already stated, the *Mahr* of a girl should not be less than the proper *Mahr* prevalent in her family. If the *Mahr* fixed is less than the proper *Mahr* then the man cannot be considered to be the equal girl. This matter may be considered from several aspects as given below:

Inadequate *Mahr* agreed upon by the wife

When a girl contracts a marriage for an inadequate *Mahr*, according to the Hanafi view her guardian for marriage or a near collateral can get the marriage dissolved on that ground.³⁶ This is based on the reason that the interests the other girls in the family shall be adversely affected by this act of the wife. The fixation of lower *Mahr* also affects the prestige of the girl's family.

Abu Yusuf and Imam Muhammad hold the view that the father or guardian or near relations are not possessed of any such authority.³⁷ They base their opinion on the ground that the *Mahr* belongs to the wife and, therefore, she can lawfully relinquish a portion of it by accepting

34. Al-Marginani, Ali B. Abi Bakar, *Al-Hedaya*, Vol. II, p. 301 (Delhi, n.d.)

35. *Supra* note 30, at p. 268

36. *Supra* note 34, at p. 272

37. *Ibid*

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

lower amount of *Mahr*. They further contended that it is open to a woman after the amount of her *Mahr* has been specified to relinquish a portion of it and that there is no difference in the cases when *Mahr* is relinquished before or after the marriage. Abu Hanifa argues that some importance and respectability are attached to a large amount of *Mahr* while its smallness may be disgraceful to the wife's family, hence the guardian has a right to object to a small amount of *Mahr*.³⁸ He further says that the relinquishment of *Mahr* after marriage does not bring any disgrace to the family as is occasioned by the fixation of a small amount of *Mahr*.³⁹

Disproportionate *Mahr* fixed by the father/guardian

If father or paternal grandfather should contract his minor child in marriage for an inadequate or too high *Mahr* the marriage is binding on minor, but if contracted by any other person, it is liable to be set aside on the suit of the minor.⁴⁰ But if the *Mahr* is very low or high, then according to Abu Yusuf and Imam Muhammad, the marriage is not legal and can be set aside. They contend that the binding nature of a marriage by the father or grandfather is based on the presumption that

38. Ibid

39. Ibid

40. Ibid

Chapter-V **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE**

they are acting in the best interest of the child but where their disregard for the interests of the minor is apparent, this presumption cannot arise, and so the contract of marriage loses its binding force.⁴¹ Abu Hanifa does not agree with this view. He says that the nearness of the relationship establishes the father's tenderness (affection) for minor and the amount of *Mahr* is not the only consideration but there are many other considerations of still greater importance than the *Mahr*, hence the marriage contracted by them shall be binding on the minor.⁴² But this rule applies when the father's or grandfather's act is bonafide; if it is malafide or if he fixed the *Mahr* while he was drunk, the marriage would not be binding on the girl.⁴³

Inadequate *Mahr* accepted by the guardian

If the marriage has been contracted by a guardian for a minor, whether a boy or a girl and the amount of the *Mahr* is lower in the case of girl and higher in the case of a boy than the proper *Mahr* prevalent in the girl's family, the marriage shall be considered unequal. The minor can apply in such a case, on attaining puberty, for the dissolution of the marriage on this ground. This rule seems to be based on the fact that it

41. Id. at pp. 301-302.

42. Id. at p. 302.

43. Supra note 30, p. 268

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

is against the interests of the boy or girl to agree to a higher or lower *Mahr* than the proper *Mahr*.

If the marriage for unequal *Mahr* is contracted by some one other than the father or the grandfather of the girl then it is an agreed view that the girl possesses a right to get it dissolved.

Marriage by agent for inadequate *Mahr*

If a person appoints an agent to contract a marriage for him or her and the agent contracts the marriage for an unreasonably low or high *Mahr* then the marriage shall not be binding because the fixation of a reasonable, that is, proper *Mahr* was an implied condition of the marriage.⁴⁴ This rule, of course, is subject to the condition that the party concerned had not authorized the agent to fix the *Mahr* at that amount.

Increment by the husband

The right to the dissolution of the marriage shall be lost if the husband should increase the amount of the *Mahr* so as to bring it in conformity with the proper *Mahr*.

Subsequent Relinquishment of *Mahr* by wife

There is a difference of opinion about the relinquishment of the whole or a portion of her *Mahr* by the wife subsequent to the time of the

44. Id. at p. 16; Supra note 31, Vol. II, p. 313.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

marriage, so that the inequality in the husband may be removed. The father or other guardians have ordinarily no right to object in such a case.⁴⁵ The Hanafis justify this opinion on the ground that the *Mahr* belongs to the wife and she can deal with it in any way she likes. But it is stated in Fatawa-i-Alamgiri that if a woman marries a destitute person (beggar) and then she gives up her claim for her *Mahr* even then the man shall not be considered to be the equal of the wife because the ability to pay the *Mahr* is determined at the time of marriage.⁴⁶

Impact of defects in spouses

Under Sunni law a wife shall get the whole of her *Mahr* if the marriage has been consummated or under the Hanafi, Maliki or Hanbali laws if there has been 'valid retirement' irrespective of the fact that whether it is dissolved by the husband or the qadi.⁴⁷ But in the absence of consummation or valid retirement she should be entitled to half the *Mahr* when marriage is dissolved by the husband.⁴⁸ If dissolved by the qadi on account of a defect in the wife, she shall not be entitled to get any *Mahr* whatsoever.⁴⁹

45. Supra note 34 at p. 300.

46. Ameer Ali Urdu Trans. of Fatawai Alamgiri, Vol. II, p. 13 (Lucknow, 1899 AD)

47. Supra note 18 at p. 262

48. Ibid.

49. Ibid

Chapter-V **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE**

Under the Shia law if a marriage is cancelled before consummation either by the husband or the wife on account of the specified defects in the other, no *Mahr* shall be payable to her.⁵⁰ This is subject to one exception, namely when the marriage is cancelled by the wife on account of her husband's impotency then she shall be entitled to get half of her *Mahr*.⁵¹

If the marriage is cancelled by either the husband or the wife after its consummation, the wife shall get her full *Mahr*.⁵²

A wife shall be entitled to maintenance even when she suffers from some physical disability such as *rataq*, *qaran*, insanity, or has been so old as to become unfit for intimacy.⁵³

***Mahr* and Iddat**

The only effect of *iddat* on *Mahr* arises in the case of a deferred *Mahr* on the pronouncement of a revocable divorce. There is a difference of opinion about the time when the deferred *Mahr* becomes payable. According to one version the deferred *Mahr* becomes payable on the pronouncement of the divorce while according to another version it does not become payable till the expiry of the period of *iddat*.⁵⁴

50. Supra note 21 at p. 262

51. Ibid

52. Ibid

53. Supra note 46, p. 407

54. Supra note 31, Vol. VII, p. 668.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

An important result of this difference is that in former case the payment to *Mahr* having become due on pronouncement of divorce, revocation of the divorce will not restore the nature of the *Mahr*, that is, the *Mahr* will not become deferred but shall remain immediately payable. In the other case the *Mahr* being not due till after the expiry of iddat, a revocation of the divorce will not affect its payment and it will still remain deferred.

The second view is generally considered to be the correct view. It is stated in Radd-al-Muhtar that the *Mahr* shall remain deferred till the expiry of the period of iddat and shall become prompt only on the expiry of that period. It is also stated therein that this is the usually accepted view.⁵⁵ In case of irrevocable divorce, the *Mahr* becomes immediately payable on such pronouncement as an irrevocable divorce puts an immediate end to the marriage.⁵⁶

Deceased Wife's *Mahr*: Obligation of Widower

If any portion of the deceased wife's *Mahr* was, under the contract of marriage or by operation of law payable by the husband on her death, the same can be claimed by the legal heirs (warison) of the deceased wife (including the husband himself).

55. Id. at p. 368.

56. Ibid.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

In the case of such a claim by any of her heirs other than the husband himself, he must discharge the liability unless he proves that before her death that the wife had lawfully agreed to forgo the *Mahr*.

If the wife predeceases the husband, the heirs of the wife, including the husband, become entitled to her *Mahr*; and he is liable for the amount less by his share.⁵⁷ They can sue him severally each for his or her share, but for a proper adjudication, all the heirs should be joined as parties to the action. In *Mohammad Ishaq*⁵⁸ one of the heirs was not made a party until more than three years from the death of the wife. The husband contended that the suit which was brought by another heir was barred. The High Court overruled the objection and decreed the claim.

In *Mubarak-un-Nissa Vs. Mansab Hassan Khan*⁵⁹ it was provided in the deed of *Mahr* that the wife was to take possession of certain property in lieu of her *Mahr*, and enjoy the usufruct thereof, but in case she predeceased the husband it would revert to him and if he predeceased her, the property would become her absolutely.

57. *Ali Bukhsh Khan Vs. Kaeem, Bibee*, I. Sel. R. 86 note (24th August, 1804)

58. *Mohammad Ishaq Vs. Sheikh Akramal Haq* (1907) 12 CWN, 84.

59. *Mubarak-un-Nissa Vs. Mansab Hasan Khan* (1911) I.L.R. 33 All 421.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

The husband having died before the wife, a question arose between the widow and his other heirs as to the effect of the deed of *Mahr*. The High Court of Allahabad held that the agreement was neither a mortgage by conditional sale nor the special form of transaction known by the term *muba'hat* but that it was a contract between the parties, which was binding on their representatives.

In another case *Mohammad Yakub Hussain*⁶⁰ the Allahabad High Court carried further the effect on an agreement between husband and wife. In this case a dispute between the parties was referred to arbitration with the result that an agreement was arrived at, confirmed subsequently by an award of the arbitrators that a certain property should be transferred in present to the wife in lieu of her *Mahr* with a control to the husband over the application of the income. It was provided, however, that if she predeceased him, he should continue in possession during his life, but that if he died before her, she should become the owner and his heirs should have no right to interfere with her possession. On the question as to the effect of this agreement, the High Court held that the award was sufficient to transfer the property and that no further conveyance was necessary.

60. *Muhammad Yakub Hussain Vs. Inayati Jan* (1911) I.L.R. 33 All 683.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

Dissolution of Muslim marriage Act, 1939

The dissolution of Muslim Marriage Act, 1939, enables a Muslim wife in India to seek the dissolution of her marriage by judicial decree on some specific grounds. The Act, in reality, incorporates one of the modes of dissolution of marriage under Islamic Law called faskh. It means the annulment of marriage by a qadi. In India under the Act, the position of the courts has been held to be akin to that of a qadi.⁶¹

Before the enactment of the dissolution of Muslim Marriage Act, 1939 the Courts in India, following the Hanafi law as the main rule of decision, had denied to Muslim women the right of the dissolution of marriage through faskh. This had become a cause of misery for many women. The Shafi'i and Ithna Ashari laws (unlike the Hanafi law) allow a wife to annul her marriage by her unilateral action and without the intervention of the Courts on the grounds of insanity, impotency and non-maintenance. Hanbali law is equally suitable to women. However, on comparison in the respect the Maliki law had been found to be most favourable to them.⁶² It was on the basis of this comparative suitability that Maulana Ashraf Ali Thanwi rightly gave a valid solution to the

61. *Mt. Umar Din Vs. Muhammad Din*, AIR 1945 Lah 51 (D.B.)

62. Fyzee, A.A.A., *Outlines of Mohammadan Law*, p. 169 (4th ed.)

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

problem of 'non-availability of the remedy of faskh'. His was the for resorting to the doctrine of takhayyur which permits an adoption of the most suitable rules for decision making in Islamic law transcending the school divergences.⁶³ He made an exposition of this principle in his book *Al-Hilat al-Najizah-lil-Halilatil'Ajizah* giving a detailed account of Maliki law on the subject. Pursuant to the approval of this by various Ulema a bill was introduced by Muhammad Ahmad Kazimi in the central legislature on April 17, 1936 which led to the passing of the Dissolution of Muslim Marriages Act on March 17, 1939.

Section 2 of Dissolution of Muslim Marriage Act contains various grounds on the basis of which a Muslim woman can claim dissolution of her marriage by a court decree. These include the grounds of 'missing-husband' non-maintenance, imprisonment of husband, impotency, insanity, leprosy, venereal diseases, option of puberty, cruelty and any other ground that may be available under Shariah like *li'an* etc.

Provision related to *Mahr*

Section 5 of the Act is related to *Mahr* which reads as follows:

63. For Takhayyar, see generally supra note 1 at p. 256

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

“Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her *Mahr* or any part thereof on the dissolution of her marriage”.

This is a vague provision though it can be understood to mean that the position of *Mahr* of a woman obtaining dissolution of marriage under the Act will remain the same as it is under the classical Muslim law and it will not be affected by the provisions of the Act.

Since in this legislation mostly, the rules of Maliki law relating to wife's right to claim dissolution of marriage were adopted, there was obviously an apprehension that the Courts may apply Maliki rules relating to *Mahr* to the cases where a marriage is dissolved under the provisions of this Act. This could have excluded the application of Hanafi, Shafi'I and Ithna Ashari rules about *Mahr* which most probably the legislature wanted to save. The difficulty in the ascertainment of the rules of Maliki law on *Mahr* might also have been apprehended by the legislature. Awaiting a judicial verdict, the question that remains open is that whether the position of *Mahr* in the marriage dissolved under the Act will be determined by the same rules of Hanafi, Shafi'I or Ithana Ashari laws which are applied to the cases of talaq or khula'. This is a

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

delicate issue and needs a careful consideration taking guidance, of course, from the nature of the legislation itself.

The nature of the dissolution of Muslim marriage Act has been described by the Courts in India in the following terms:

“The Act is a piece of declaratory legislation....”⁶⁴

“The Act crystallizes only a portion of Muslim law and should, therefore, be applied in conjunction with the provisions of the whole of Muslim law.”⁶⁵

Thus to find out the position of *Mahr* vis-à-vis the grounds of marriage dissolution enshrined in the Act cannot be ignored.

Impact of Shah Banors case and the Muslim women Act 1986 on *Mahr*

In order to make a speedy remedy available to the wives for the enforcement of their maintenance claims, provisions were incorporated in the Code of Criminal Procedure (Cr.P.C.) 1898. This Code was replaced by a new one in 1973. In the code of 1973 the provisions relating to the maintenance claims were retained in Sections 125-128 with a significant change, whereby the divorced wives have been made able to claim maintenance from their erstwhile husbands even after

64. *Fazal Begum Vs. Hakim Ali*, AIR 1941 Lah 22.

65. AIR 1951 Nag. 375.

Chapter-V* **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE*

divorce up to remarriage or death, whichever is earlier.⁶⁶ These provisions with an obvious contradiction with the Shariah were sought to be modified by the Indian Muslims so far as their application to them was concerned. Pursuant to this demand an exception clause, in general terms, was added to these provisions in section 127(3)(b) of the Code in favour of any person who may have discharged his liability towards the divorce under the personal law. Under Section 127(3)(b) the magistrate is required to cancel any maintenance order passed under section 125 if;

“She (the divorcee) has received, whether before or after the date of the said order the whole of the sum which under any customary or personal law applicable of the parties, was payable on such divorce”.

Whether irony or irradiation it is, that in 1979, the Supreme Court brought to the focus another dimension of these supervisions in the following words:

The purpose of the payment under any customary or personal laws must to be obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. The whole theme of S. 127(3)(b) is manifestly to recognize the substitute maintenance arrangement by lump sum payment organized

66. Section 125 of Code of Criminal Procedure, 1973.

Chapter-V **MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE**

by the custom of the community or the personal law of the parties.⁶⁷

Thus, even a Muslim husband who has discharged every liability under his personal law, would be held to be bound to maintain his wife even after divorce and after the expiry of iddat. The same trend was maintained by the Supreme Court in subsequent cases like *Faz-lunbi Vs. K. Khader Vali*⁶⁸ and the most famous case of *Muhammad Ahmad Khan Vs. Shah Bano Begum*.⁶⁹ Consequently the protection which was intended to be given to Muslim law against suppression by section 125 of the Cr. P.C., through section 127(3)(b) proved to be quite insufficient. For this reason and the Supreme Court's taking into its own hands the interpretation of the Quran started a countrywide agitation against the Shah Bano decision. Consequent upon the Govt. of India got a new enactment passed by the Parliament titled as Muslim Women (protection of Rights on Divorce) Act, 1986 to undo the effect of Shah Bano ruling.

In all these decisions which led to the enactment of the Muslim Women Act, 1986 *Mahr'* has received both just and unjust treatment at

67. *Bai Tahira Vs. Ali Hussain*, AIR 1979 SC. 362 at pp. 365-366; Emphasis added.

68. AIR 1980 SC 1730.

69. AIR 1985 SC 945; For details see Infra note 85.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

the hands of the judges. In the Bai Tahira case the Court treated *Mahr* as one of the 'substitute payments for maintenance' under Muslim Personal Law:

"Payment of *Mahr* money as a customary discharge is within the cognizance of that provision" [i.e., Section 127(3)(b)].⁷⁰

These words from the Supreme Court judgment in bai Tahira create a wrong impression about *Mahr*, as if it is an incident of divorce rather than effect on marriage. Islam has ordained *Mahr* as a separate right of the Muslim women. It is neither a provision for maintenance nor something to be given in lieu of maintenance. It has its own social and legal purposes.

Later the Supreme Court appreciated the difference between *Mahr* and maintenance in the following words:

"The quintessence of *Mahr* whether it is prompt or deferred is clearly not a contemplated qualification of a sum of money in lieu of maintenance upon divorce".⁷¹

The difference between the *Mahr* and maintenance was further made clear by the Supreme Court itself in 1985 in the case of

70. Supra note 67 at p. 286

71. Supra note 68 at 1736.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

Muhammad Ahmad Khan Vs., Shah Bano Begum in the following good or bad terms:

If *Mahr* is an amount which the wife is entitled to receive from the husband 'in consideration' of the marriage, that is the very opposite of the amount being payable in consideration of divorce. No amount which is payable in consideration of marriage can possibly be described as an amount payable in consideration of divorce. The alternative premise that the *Mahr* is an obligation imposed upon the husband as a mark of respect for the wife is wholly detrimental to the stance that it is an amount payable to the wife on divorce. He does not divorce her as a mark of respect. Therefore, a sum payable to the wife out of respect, cannot be a sum payable on divorce.⁷²

Further it was observed:

Deferred *Mahr* (even if) payable at the time of dissolution of marriage, cannot justify the conclusion that it is payable 'on divorce'.⁷³

It was concluded that *Mahr* is not a sum payable on divorce and is not a substitute payment for maintenance. But the divergence in the Court deliveries about *Mahr* and maintenance vis-à-vis Section 127(3)(b) Cr. P.C., cannot be carried too far. In Bai Tahira the Court treated *Mahr*

72. Id at pp. 952-953.

73. Ibid; See Lucy Carrol, "Divorces' *Mahr* and Muslim women's Right to Maintenance", 27 JILL, pp. 487-495.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

as a 'customary discharge' within the cognizance of Section 127(3)(b) as per that judgment an adequate amount of *Mahr* could have exonerated the husband from liability under Section 125. In *Shah Banu*, the Court held that it had been in error in its earlier judgment, and that *Mahr* does not fall within the meaning of Section 127(3)(b). The reality is that if the amount of *Mahr* with or without any other property of the wife, was sufficient to make a woman able to maintain herself she could not claim relief under Section 125. In other words, while determining the ability of the wife to maintain herself under Section 125 of The Court would take into consideration the whole property of the wife including *Mahr*. So the differentiation made between *Mahr* and maintenance in *Shah Bano* loses its merit. It may, however, be pointed out that the differentiation between *Mahr* and maintenance is quite understandable and fully maintainable under Islamic law which, unfortunately, the scheme of maintenance law under Cr. P.C., as applied by the Courts in India has missed its clear appreciation.

Provision of the Act related to *Mahr*

Section 3 of the Act contains a list of the benefits and properties, which can be claimed by a wife on divorce, failing which she can seek

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

magisterial action. Mention of *Mahr* has been made in Section 3(1)(c) of the Act in the following words:

“A divorced woman shall be entitled to an amount equal to the sum of *Mahr* agreed to be paid to her at the time of her marriage and at any time thereafter according to Muslim law”.

In this clause the words “an amount equal to the sum of *Mahr* agreed to be paid”, are full of perplexity and confusion. It leads one to a clumsy situation of choosing the best from all the worst that it can be supposed to mean. Shrouded with controversy the provision seems to have laid down that:

- (i) even if full or part payment of the specified *Mahr* has already taken place before divorce the wife will be entitled to a further amount equal to such *Mahr*, specified and discharged already; and
- (ii) if the sum of *Mahr* was never fixed by the parties to the marriage then she will not be entitled to anything – when she is entitled to proper *Mahr* under Shariah.⁷⁴

The result is that in the cases falling under situation (i) double payment of *Mahr* will be due to the wife from the husband. Contrarily in the cases falling under situation (ii) no *Mahr* will be payable.

74. See, Tahir Mahmood, *Islamic CLQ* (1986) pp. 172-173.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

Also, from the cause under discussion it is not clear that what will be the entitlement of the divorced women when:

- (i) no *Mahr* was fixed by the parties but the husband has paid in full or part the 'proper' *Mahr* to her during marriage;
- (ii) she is under Muslim law entitled to either no *Mahr* or only a portion of it;
- (iii) the *Mahr* was reduced or enhanced before divorce;
- (iv) the *Mahr* was fully remitted by her

Moreover, from the scheme of the Act one feels that *Mahr* stands shifted from its basic position of being an independent institution of Islamic law and has been made a part of the maintenance law as was done by the Supreme Court in *Bai Tahira*.

The fact is, as observed by Professor Tahir Mahmood that:

"The provisions of the Act relating to Mahr are badly drafted and do not represent the true principles of Islamic law".⁷⁵

Some cases decided under the Act of 1986- e.g. *Arab Ahmad bin Abdullah Vs. A.B. Mohmuna Saiyadbhai*⁷⁶, however, show that the Courts, have consciously or unconsciously counted *Mahr* as an additional

75. Ibid.

76. AIR 1988 Guj 141; Any discussion on the main issue in this case is beyond the scope of this work, See *Infra* note 85.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

payment different from ordinary maintenance. The distinction must be properly understood and maintained.

Mahr, Nafaqah & Mata': Nature and Inter-Relationship

Mahr is a gift spontaneous to be presented to the wife by the husband on nikah with a willing heart. This is an honor to the bride from the husband. He by his mistakes makes a manifestation of his sincerity to respect her rights to his fullest possible capability. So *Mahr* is a symbolic representation of the earnestness in sharing love and a vow to stand by each other with the object of transcendent tranquility under the chaste alliance known as nikah (the basis of the fundamental unit of Islamic society - the family). This is the basic purpose of *Mahr*.

The amount of *Mahr* must be in accordance with the position of husband and the wife. The amount must not be in excess of their capabilities. Hazrat Umar (R.A.) has opined that unreasonable amounts of *Mahr* should neither be stipulated nor paid or received as this is, in the final analysis, at variance with the object and purpose of *Mahr*. He once remarked:

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

You should not fix unreasonably high amounts of *Mahr* because if it would have an element of worldly nobility or divine felicity, then the Apostle was the most worthy of it all.⁷⁷

The unreasonably high amount of *Mahr* can be a source of unnecessary anxiety creating strain on the union followed by doubt and suspicion resulting into divorce. In such circumstances *Mahr* usually remains unpaid and also there remains no possibility of lawful remission of *Mahr*. The *Mahr* remaining unpaid is being claimed after dissolution of marriage because of which, unfortunately, some confuse it either with earlier concept of dower at common law or with substitute maintenance of divorced woman.

Nafaqah is the means of sustenance (including every reasonable facility of life) to be kept availability by the husband to the wife during the subsistence of nikah. This is to facilitate ordinarily a joint living of the wife with the husband and performance of matrimonial obligations. This brings a family into existence and provides a ground for its endurance. Without nafaqah matrimonial home is neither desirable nor possible.

77. Professor M. Taqi Amini, *Time Changes and Islamic Law*, p. 184-85, 210 (English translation by Prof. Ghulam Ahmad Khan).

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

Basically the obligation of the husband is that of qawwam (Procter and maintainer) towards the wife and when the children are born the liability extends to maintain them also. So, the purpose behind the nafaqah is the strengthening of family ties creating a chaste social order. The moment the basic fibre of the family is hit the maintenance stops. Therefore, if the wife becomes refractory (nashizah), she loses her right to maintenance or if the nikah is broken the right to maintenance ceases. It only continues upto the expiry of iddat during which the nikah is notionally supposed to continue so that the possibility of reconciliation is worked out by the parties or any pregnancy of the wife is determined for the clarity of parentage. A refractory or adulterous wife is not entitled to iddat maintenance.⁷⁸

Mata' is the parting gift to be offered to a wife on separation due to the dissolution of marriage by the husband. It must be given with humanity and kindness to remove any cause for accusation or shame which may arise from divorce which is in Islam the most detestable act. The obligation by the relatives and friends which can cause more thinking about separation and may stimulate a reconciliation.

78. Hedaya p. 72, 145-46 (Hamilton's Translation, 1870 ed. by Grady).

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

Ultimately, if the result is separation, *mata'* will be due to the wife as a parting gift. It falls in line with the Quranic directive:

"either retain them (the wives) with kindness or part from them with mercy".⁷⁹

In the scheme of the law relating to *nikah* all the three obligations of *Mahr*, *nafaqah* and *mata'* have, therefore, a successive role to perform on *nikah*, during *nikah* and on termination of *nikah* respectively. All these, however, aim at one common objective, that is, strengthening of the family. Now where a breach occurs with respect to the payment of *Mahr*, *nafaqah* or *mata'*, legal action follows for their enforcement.

Mata' must not be confused with *nafaqah* (maintenance). In no sense *mata'* means maintenance from an erstwhile husband. The right to maintenance gets suspended even during the marriage for some just cause (for example, when the wife becomes a *nashizah* (refractory)). There can be no reason to grant maintenance to such a wife after divorce. But such a wife is also entitled to *mata'* on the dissolution of her marriage. Had *mata'* been same as maintenance then *mata'* would never had been payable to a refractory wife or *nashizah*.

79. II:229; Some people, though consider *mata'* different from *nafaqah*, present a muddled view of it, see ASIL (1985).

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

Moreover, *mata'* in its actual nature, is a gift and relates to some definite occasion while as maintenance right relates to time periods. It becomes due with respect to a time period and gets suspended or withdrawn accordingly. In law, also maintenance is always determined with respect to time. In the Quran where word *mata'* is used in the meaning of maintenance, the time period is specified with it. Where it is used to denote a gift, enjoyment, Profit, comfort, a little enjoyment, possession, for use and convenience. In such cases, the time period is not specified with it.

Mahr, *nafaqah* and *mata'* have existed as independent institutions of Islamic Law throughout its history. Modern instances can also be found in some cases available in which *mata'* has been treated as a separate claim in addition to other claims.⁸⁰

Thus the divorced women's entitlement of *Mahr* varies from case to case depending upon the circumstances & forms of dissolution. The detail account we find in classical shariah law. Keeping them aside is neither affordable nor advisable in contemporary society.

80. II:236, 241; II:193, IV:77; XVI:177; IX:38; X:70; III:34; LXXIX:37, LXXX:32

Chapter-V* **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE*

Muslim Widow's Right to retain possession of husband's estate in lieu of dower

The most important right which is available to a Muslim woman on the death of her husband is her right to retain possession over the property of her deceased husband till her unpaid dower debt is paid to her. This is known as 'Widow's right of retention'.

If the wife, during the life time of her husband, is in exclusive possession of a property or a part of property of her husband, she on the death of her husband, has the right without the assent of the heirs to remain in undisturbed possession of the same till the payment of her dower debt is made to her, provided her possession must have been acquired validly and peacefully without coercion or deceit. Provided further that the possession must not be that of a mortgage nor should it be such that it may create proprietary right in her favour. The widow during her possession over property, shall simultaneously have the right of suing the heirs for the realization of her dower debt.

In the event of filing a suit for the realization of her dower debt she shall have to express her willingness to give up her possession at the realization of her dower debt. However, she is entitled to receive her

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

inherited share in her husband's property independent of her dower debt.

On the basis of above discussion it may be deduced that the dower ranks as a debt, and the wife is entitled, alongwith other creditors, to have it satisfied on the death of the husband out of his estate. Her right is no higher than that of any other unsecured creditor, and as such it does not entitle her to charge on any specific property of her deceased husband. She must, however, be paid, like other creditors, before legacies' distribution of the estate.

But if she has lawfully and without force or fraud obtained in lieu of her dower actual possession of the whole or part of her deceased husband's property, she is entitle to retain that possession as against the other heirs and against other creditors of her husband, until her dower is satisfied.⁸¹

If a contract was entered for marriage and the defendant had performed her part and the disputed property was written in the contract, then it was held that suit would be barred by Section 53-A of

81. *Mohammad Taqi Khan Vs. Tarmoodi Begum*, (1941) All 326.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

the Transfer of Property Act.⁸² But if the transfer to wife is made, where dower is not actually due, for defeating claim of other creditors then such transaction should be avoided.⁸³ If a wife wishes to forestall other creditors to obtain what is due for her first, there is nothing fraudulent in her action in carrying out such a wish.⁸⁴ After death of the husband widow's right to dower accrue and she is entitled to retain the possession of husband's property, if obtained lawfully and without force, may continue to retain the possession and it is called widows right of retention, if dower remains unpaid.⁸⁵ The question whether the transaction is really a transfer or a sham or stimulated transfer must be declared on the particular facts of a case.⁸⁶ There is no rule of Mohammedan Law, which is inconsistent with the provisions of Section 53 of the Transfer of Property Act.⁸⁷ A transfer in lieu of dower cannot be impeached under Section 53 of the Transfer Property Act.⁸⁸

It is clear that amount of dower in coins is not mentioned. It is also clear that the suit lands were given to the plaintiff to meet the

82. *Haji Mokshed Mondal Vs. Del Rousan Bibi*, AIR 1971 Cal 162.

83. *Syed Mohd. Haider Vs. Safdar Shah*, AIR 1930 Oudh 230.

84. *Zamir Hussain Khan Vs. Tassaduq Ali Khan*, AIR 1925 Oudh 171.

85. *Mirvahidalli Vs. Rashid Beg*, AIR 1951 Bom 22.

86. *Mst. Manihar Bibi Vs. Rakha Singh*, AIR 1954 Manipur 1; *Kulsumbi Vs. Bilan Khan*, AIR 1929 Nag 121.

87. *Ahmad Hussain Vs. Kallu Mian*, AIR 1929 All 277.

88. *Rameshwar Nath Vs. Aftab Begum*, AIR 1936 All 803.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

dower debt. Whether the words 'in lieu of dower' would in these circumstances be of special significance and import is to be considered in the light of various decisions rendered by various High Courts while dealing with this aspect of the matter of registration and the question whether such transfer is simple gift (*hiba*, or '*hiba-bil-iwaz*' or sale. The principle that under Mohammedan Law, dower is an obligation imposed upon the husband as a mark of respect to the wife has been accepted by all the High Courts. It is well-settled that dower or *Mahr* can be in law recovered by the wife concerned by instituting an action in law as if it was a debt due to her. Hence it follows that the obligation to pay dower to his wife that Mohammedan Law imposes on a husband gives rise to a debt in favour of his wife.⁸⁹

The Muslim widow is entitled to retain possession of the property in lieu of dower debt payable to her and such right is heritable and alienable. In the event of sale of such property the purchasers step into the shoes of the widow and acquire right to possession coupled with right to payment of dower notwithstanding the recital in the sale deed purporting to convey absolute rights. The rights of the widow to

89. *Imambi Vs. Khaja Hussain*, AIR 1988 Kant 51 : ILR 1987 Kant 3397 : (1988) 24 Reports 28: (1988) 1 Kant LJ 294 : (1988) 2 DMC 67 : (1988) 2 Hindu LR 325.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

transfer her rights in the property for consideration is not fettered. Though the sale deed executed by the widow purports to convey absolute rights, such sale, to be sustained to the extent to right to possession accompanied by the right to payment dower debt.⁹⁰

It is well-settled that the claim for unpaid dower constitutes a debt. The decision in *Jubair Ahmad Vs. Jainandan Prasad Singh*,⁹¹ is clearly distinguishable. What was held not to be property was not the dower debt but the interest, which the widow had in the property in her possession in lieu of dower debt.⁹²

A transfer in lieu of dower will be valid if the dower is really due even if other creditors are defeated.⁹³

A transfer in lieu of dower cannot be impeached under Section 53 of the transfer of Property Act.⁹⁴

The question whether the dower was to be prompt or deferred is of minor importance as satisfaction of deferred dower debt can be valid consideration for a transfer between husband and the wife.⁹⁵

90. *Ghouse Yar Khan and others Vs. Fatima Begum and others*, AIR 1988 AP 354 at pp. 357, 358 : (1987) 2 APLJ 282 : (1987) 2 Andh LT 639 : (1988) 1 Cur CC 477.

91. AIR 1960 Pat 147.

92. *Md. Janudul Haque Vs. Md. Zubair Haider*, 1 (1982) DMC 132 at p. 133.

93. *Mahadeo Lal Vs. Bibi Maniram*, AIR 1933 Pat 281.

94. *Rameshwar Nath Vs. Aftab Begum*, AIR 1936 All 803.

95. *Kulsambi Vs. Bilan Khan*, AIR 1929 Nag 121.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

If the widow gets into possession of the property and dies after that her heirs are entitled to retain possession as widows' lien is heritable.⁹⁶

A widow in possession of her husband's property in lieu of her dower is entitled to continue till her dower debt is satisfied and after its satisfaction from the income and profits of the property the right of retention is lost, the widow is under an obligation to hand over the possession of the property to other heirs, while keeping her share as an heir to the husband, with herself.⁹⁷

The right of possession which the widow secures as creditor for her dower debt, is property and is prima facie transferable.⁹⁸

The right of possession which widow secures as creditor for her dower debt is transferable.⁹⁹

The dower debt of a widow is not property speaking, a charge upon the property of her husband, and the interest which she has in the property in her possession in lieu of dower debt is therefore an interest restricted in its enjoyment to her personally within the meaning of

96. *Cooverbai Vs. Hayabi*, AIR 1943 Bom 372.

97. *Nabiban Vs. Sheikh Medu*, 2 ALJ 775.

98. *Abdullah Vs. Shamsul Haq*, AIR 1921 All 262.

99. *Cooverbai Vs. Hayatbi*, AIR 1943 Bom 372.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

Section 6(d) of the Transfer of Property Act, and so it is not capable of alienation.¹⁰⁰

The widow was in possession of 1/3 share in a house. She is an heir was entitled to 1/12 of the house. But she transferred the entire 1/3 share in the house which had been and was in her possession and occupation as absolute proprietor in lieu of dower debt the Court held that the widow could transfer by sale deed her right, title and interest in the property i.e., 1/12 share only but could not transfer her right to possession of the property in lieu of her dower debt.¹⁰¹

A husband can transfer his property in the favour of his wife, in lieu of her dower-debt even though it has not fallen due (as in case of deferred dower). But such transfer is subject to the provisions of Section 53 of the Transfer of Property Act, 1882 which deals with Fraudulent Transfer. Accordingly, every transfer of immovable property made with intent to (a) defeat or delay the creditors of the transferee, or (b) defraud a subsequent transferee, the transfer being without consideration, shall be voidable at the option of (a) any creditor so defeated or delayed or (b) such subsequent transferee. Nothing contained in above mentioned

100. *Sheikh Mohammad Zobair Vs. Mst. Bibi Sahidan*, AIR 1942 Pat 210.

101. *Abdul Samad Vs. Alimuddin*, AIR 1944 Pat 174.

Chapter-V* **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE*

Clause (a) (i) shall impair the rights of a transferee in good faith and for consideration, or (ii) affect any law relating to insolvency.

It is not necessary that widow's possession should have been taken with the express intention of holding it in lieu of dower.¹⁰²

If the transfer in so far as it was for deferred dower is tainted with fraud, the whole transaction must be set aside.¹⁰³

When alienation was made more than two years before the adjudgment of the insolvent, it could be set aside under Section 4 not under Section 53, of the Provincial Insolvency Act and the Insolvency Court could only deal with question according to same principle which would have governed a suit for avoidance of the transfer under the ordinary law.¹⁰⁴

Where the husband gives fraudulent preference to his wife by transferring property in favor of his wife in lieu of dower, then the only remedy to other aggrieved creditors is to approach the insolvency Court

102. *Mohd. Sahib Vs. Zaib Jahan*, AIR 1927 All 850.

103. *Sarb Krishna Vs. Mst. Fatima*, AIR 1937 Lah 859.

104. *Basharat Ali Shah Vs. Ram Pattah*, AIR 1938 Lah 73.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

within two years of transfer when they would be placed on same footing as the preferred creditors.¹⁰⁵

The widow has the right to possession of the properties of her husband in lieu of the dower-debt and so long as her dower-debt remains unsatisfied and she does not transfer the dower. If she can transfer for her life time possession of the property.¹⁰⁶

The right of the Muhammedan widow to hold the property as a security for the dower debt and to continue possession thereof until the dower debt was satisfied, was property, which was both heritable and transferable.¹⁰⁷

The presumption as to widow's possession comes into existence for first time on the dissolution of marriage.¹⁰⁸

The widow or divorcer is liable to render full account of the income and profits of the property received by her to the heirs of the husband or husband respectively.¹⁰⁹

When the husband was not the owner of the property when he made the transfer, acquiring title to it afterwards, the Court of equity

105. *Mst. Razina Khatun Vs. Mst. Abida Khatun*, AIR 1937 All 39.

106. *Abdur Rahman Vs. Wali Mohammad*, AIR 1923 Pat 72.

107. *Mst. Bibi Makbulnunnissa Vs. Mst. Bibi Umatunnissa*, AIR 1923 Pat 33.

108. *P.S. Narayana Ayyar Vs. Biyar Bivi*, AIR 1922 Mad 221.

109. *Saikh Salma Vs. Md. Abdul*, AIR 1961 AP 428.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

will compel the husband to perform the contract. The entire property would pass to the wife under the principle of feeding the estoppels.¹¹⁰

If the widow wishes to forestall other creditors and to obtain what is due to her first, there is nothing fraudulent in her action in carrying out such a wish.¹¹¹

When a transfer is made with a view to defeat or delay creditors, the creditors can avoid it under Section 53 of the Transfer of Property Act, 1882.¹¹²

Where possession is obtained after the death of the husband, there is a presumption that it was legally and peacefully obtained. It is for heirs to prove that possession is not in lieu for dower.

If in mutation proceedings the name of the widow is entered into the Board of Rights with the knowledge of the heirs, the consent of the heirs will be implied. If after the death of husband, the heirs made no opposition whatsoever that is enough to show in Mohammedan Law that the widow entered, into possession lawfully in lieu of her dower, without force or fraud.

110. *Rustam Ali Vs. Abdul Jabbar*, AIR 1923 Cal 535.

111. *Zamin Hussain Khan Vs. Tussaduq Ali Khan*, AIR 1925 Oudh 111.

112. *Syed Mohd. Haider Vs. Safdar Sah*, AIR 1930 Oudh 230.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

The requirement continuing or getting possession of the husband's estate on divorce is entitled to retain possession of husband's property, after the death of her husband if she gets into it with the consent of heirs, express or implied.

A widow who was in possession of her husband's property in lieu of her dower-debt could not mortgage her right of possession. But if a widow gets into possession of her husband's property already mortgaged she cannot set up the right to retain possession which must be delivered to the purchaser on sale.

Where transfer of property was made orally by the husband in lieu of dower it was held that this transfer does not convey title. This right exists till the dower debt claim is discharged.

Salient Features for right of retention -

- (i) If a wife, whose marriage has been dissolved by death or divorce, lawfully obtains or already in possession of her husband's property, she or her heirs have a right to continue to hold the possession of such property against his heirs, or other unsecured creditors, till her dower debt is satisfied provided.
 - (a) The wife is liable to render full account of income and profits to the heirs of her husband.

Chapter-V* **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE*

- (b) She has no right of alienation and mortgage of such property.
- (ii) Such possession in the exercise of her right of retention is not a bar to file a suit for the recovery of the dower debts by a widow or a divorcee.
- (iii) The right of retention not being a adverse possession, is heritable and transferable to some extent.
- (iv) The right of retention does not create a charge on the property.
- (v) The heirs of the husband may sue for recovery of possession of their respective shares in the property only when dower debt of the widow is satisfied. No Res Judicata applies to any subsequent suits.

The following features of right to retain possession must be noted:

- (i) No right of retention during continuance of marriage – The right comes into existence only after the death of her husband, or if the marriage is dissolved by divorce, immediately on such divorce, but not before.

Thus, if a creditor of the husband obtains a decree against him and the husband's property is sold in execution in his lifetime, the wife has no right of retention against a purchaser in execution of the decree and she must deliver possession to him.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

- (ii) The right of retention not analogous to a mortgage – the woman has no interest in the property, as a mortgage has under an ordinary mortgage. There is no true analogy between her right of retention and mortgage. In the case of a mortgage, the mortgagee retains possession under an agreement between him and the mortgagor, while her right of retention does not arise from any such agreement but is conferred on her by law.
- (iii) Not a charge – The right does not constitute a charge on the property and as such, she is not a secured creditor. If the property, which is being held by her lieu of dower under her right of retention has been mortgaged by her deceased husband, the mortgagee can sell it free of her right and can oust her from possession.
- (iv) A possessory lien on property; no title –
 - (a) She is to satisfy her claim for dower with the rents and profits accruing from the property.
 - (b) The right of retention does not give her any title to the property. The title to the property is in the heirs, including, of course, the widow.
 - (c) She cannot alienate the property by sale or mortgage to satisfy her dower. If she alienates the property, it is valid to the extent of her own share.
- (v) Widow in possession liable to account – A widow in possession of her husband's estate is bound to account the other heirs of her husband for the rents and profits received by her out of the estate

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

while she is herself entitled to charge interest on the dower due to her and to set it off against the net profits.

- (vi) Can sue heirs – The widow is not disentitled to sue her husband's heirs for the recovery of her dower out of his assets on the ground that she is retaining the property.
- (vii) Heritable and transferable – The right to hold possession is heritable. Though it cannot be said with certainty. The opinion mostly is in favor of view that it is also transferable. She can assign her right to *Mahr*.
- (viii) Extinction of her right – The right of retention is extinguished –
 - (i) If she voluntarily gives up the possession, or
 - (ii) If she is dispossessed, though she can sue for re-possession, if dispossessed by force or fraud.

This right is essentially a right to retain possession, which she has obtained and not to obtain possession is exercise of that right. Although the right of retention is transferable yet it can be transferred only along with dower debt itself and not separately.

It is open to a lady to relinquish her entire dower debt in whatever claim she had on account of the dower debts against the heirs of her husband. A remission may be made conditionally i.e., on execution of a waqfnama.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

Where the heirs of the husband files a suit for recovery of possession of the property, which is under the possession of the widow in lieu of her dower-debt, the Court passes a decree on the condition that the heirs should pay her dower-debt within a certain period failing which the suit would fail. And if the heirs do not pay the amount within the time mentioned they can file another suit and this second suit or other subsequent suits are not barred by Res Judicata.

The heirs have also the right of alienating their shares in the property but the alienee will take the property subject to the widow's right of dower-debt and he cannot disturb her possession.

The heirs have also a right to recovery of possession of their respective shares of property. In case where an heir files a suit for recovery of the possession of his respective share in the property, the Court may pass a decree allowing him to recover separate share of property on payment of proportionate amount of dower-debt within a specified period.

If widow does not give possession, the heirs may sue for possession but first, they should sue for taking of accounts so that it should be ascertained whether dower is due or has been satisfied.

Chapter-V* **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE*

If a widow transfers the property but does not deliver possession, the heirs can sue for a declaration that the transfer is not binding on them but in such a case, they are not entitled to recover possession because the lien has not been lost. If wrongfully, dispossessed by the heirs of the husband the widow can bring a suit under Section 9 of the Specific Relief Act, for recovery of immovable property only within six months from the date of her dispossession.

The right of the widow to retain the possession of her husband's property until satisfaction of the dower-debt does not carry with the right of selling, mortgaging or gifting or otherwise transferring the property.

In case of dispossession of immovable property, she can sue within three years from the date on which she first learns about the possession under Article 68 of the Limitation Act, 1963. But if the widow is dispossessed by a rank trespasser, she can file suit within twelve years Article 64 of the Limitation Act, 1963.

However, there is a difference of opinion in regard to the possession and retention of property for unpaid dower, which should be with or without the consent of deceased husband or legal heirs. The

Chapter-V* **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE*

consent is immaterial in this regard because dower is a debt under the Islamic Law, and if unpaid, widow has every right to retain the possession until her dower is paid irrespective of any consent from any quarter. In a way a widow is a custodian of the property using only usufruct. Widow is not entitled to sell, mortgage or gift the property as a custodian. This position of widow is different from that of being a legal heir to her deceased husband's property. If widow tries to dispose the property in any manner, she loses her right of retention. She cannot become owner of property by lapse of time.

The right of retention whether heritable or transferable -

There is conflict of judicial opinions whether the widow's right to hold possession is transferable and heritable.

1. One view is that the right is a personal right and not a lien and it cannot therefore be transferred by sale, gift or otherwise nor can it pass to her heirs on her death.
2. The other view is of the Mysore High Court that the right to hold possession is the right both heritable and transferable. Such right to retain possession can also be exercised by her heirs after her death. It has been held in a case that it is heritable without expressing any opinion whether it is also transferable.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

3. In another case of the Allahabad High Court it has been held that it is both transferable and heritable.

The right of a widow to retain possession of her husband's property under a claim for her dower does not carry with it the right to alienate the property by sale, mortgage, gift or otherwise. If she alienates the property, the alienation is valid to the extent of her own share and not of the shares of other heirs of her husband.¹¹³

If she delivers possession thereof to the alienee, the other heirs become entitled to recover immediate possession of their shares unconditionally, that is, without payment of their proportionate share of the dower-debt. The widow is not entitled on the alienation being set aside, to be restored back to possession. By giving up possession of the property, she loses her right to hold possession thereof and whether she loses her right to the dower-debt is an open question.

If the widow does not deliver possession to the alienee, as whether she executes a mortgage without possession, the other heirs are entitled to a declaration that the mortgage does not bind their shares but they are not entitled to immediate and unconditional possession thereof.

113. *Coove bhai Vs. Havatbi*, (1943) 45 Bom LR 730.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

The wife may legally transfer her right to recover her dower debt to any one she likes.

Under Article 3 of the Limitation Act, 1908, failing which her right to recover possession will be lost and even her lien also.¹¹⁴

If any alienation is made by a widow, it cannot affect the share of other heirs and to that extent, will be void and it will be valid to the extent of her share as a heir to her deceased husband. If she hands over the possession to the alienee the heirs get an immediate right of possession and the possession cannot be restored to the widow, as she has voluntarily transferred it to the alienee.¹¹⁵

The dower debt is not a charge upon the property of the husband and the interest which she has in the property in her possession in lieu of dower debt is therefore an interest restricted in its enjoyment to her personally within the meaning of Section 6(d) of the Transfer of Property Act, 1882, and as such is not capable of alienation.¹¹⁶

114. *Mashal Singh Vs. Ahmad Hussain*, AIR 1927 All 534.

115. *Maina Bibi Vs. Vakil Ahmad*, AIR 1925 PC 63.

116. *Zobair Ahmad Vs. Jainandar Prasad Singh*, AIR 1960 Pat 147.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

Whether transferable the widow can transfer merely her right to retention without parting with her dower debt.¹¹⁷

In *Maina Bibi Vs. Vakil Ahmad*,¹¹⁸ the Privy Council held:

"There is no ground for the contention, if it has been really put forward, that because these deeds fail to effect a transfer of the absolute interest with which they purport to deal, they operate to transfer the widow's dower debt and her right to held possession of the lands, till that debt is paid. By giving the possession of the lands as in her deeds she alleges that she has done, she has undoubtedly lost her right to hold possession of them."

A widow in possession in lieu of dower does not for that reason become the exclusive owner of the property bring of hold the property adversely to heirs. She cannot become an owner by lapse of time.¹¹⁹

Under the law it was for defendant who can set up a case of relinquishment to show that it was made by the lady voluntarily and her own free will and without any pressure.¹²⁰

117. *Mst. Bibi Vs. Mst. Musi Bibi*, AIR 1923 Pat 33.

118. AIR 1925 PC 63.

119. *Hira Singh Vs. Mosaheb*, AIR 1921 Pat 353.

120. *Sajjad Hussain Vs. Mohd. Sayid Hasan*, AIR 1931 All 71.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

The majority for purposes of relinquishment of dower is to be determined according to Mohammedan Law i.e., majority is attained on puberty as per Allahabad and Calcutta High Courts.¹²¹

Where an agreement is made at the time of the marriage that the wife shall not be competent to relinquish her dower without the consent of her relations, the agreement would be valid and relinquishment without such consent would be void.¹²²

The widow is entitled to remain in possession of husband's property if she got into possession "lawfully and without force or fraud", till she has been paid her dower, but she has not interest or estate in the property as a mortgagee. The facts of this case are on the death of her husband in 1850, Maina Bibi entered into possession of his property. Some heirs of the husband filed a suit to obtain possession of their share in 1902. The widow Maina Bibi pleaded that her possession was in lieu of her dower and she had a right to retain the same. In 1903, a decree, in favour of the heirs on the condition that they paid certain sum of money together with interest to the widow towards her dower within six months was passed by the Trial Court. But no amount was

121. *Qasim Hussain Vs. Bibi Kaniz*. AIR 1932 All 649; *Mazharul Vs. Abdul*, AIR 1925 Cal 322.

122. *Mst. Khadija Vs. Nisar Ahmad*, AIR 1936 Lah 887.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

paid to the widow, and she continued in possession of the property. In 1907, the widow made a gift of the property, which was challenged by the heirs of the husband. The Court held that the widow merely had a right of retention of possession until she was paid but she could not make an alienation of the property. In this case, though no consent of the heirs to retain the possession was taken, yet the Court held her possession as lawfully acquired, so there is some controversy on this point, whether the possession of the widow or divorce should be with the consent, of the husband or the heirs.¹²³

A suit for partition of even on item of property is maintainable in case of tenants in common. The ordinary rule that a suit for partial partition of the properties owned by the parties to the suit is not maintainable does not apply however, to the case of co-owners, who hold land as tenants in common as distinguished from the co-sharers holding land as joint tenants. In the case of tenancy-in-common, each co-owner has not interest in each item of the property held as tenancy in common, and he is entitled to claim partition in respect of even one of these items without seeking for partition of the other items. In the case of Mohammedans, the co-heirs are only tenants-in-common, and there

123. *Maina Bibi Vs. Vakil Ahmad*, (1924) AIR 1925 PC 63.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

is no joint family in the Hindu Law sense of the term. In the instant case, all the parties to the suit were interested in the items of the properties given in Schedule A of the plaint. Therefore, the suit cannot fail if all the properties left by Habibul Hassan and Mohd. Eilyas Hussain have not been included in this suit.¹²⁴

The right of retention is not available to a wife during the continuance of marriage. Such right of retention is her lien which she is entitled to retains if dispossessed, she can sue for the recovery of possession.¹²⁵

The right of retention means that a Mohammedan wife is entitled to remain in possession of her husband's property, on the dissolution of marriage either by death or divorce, till her dower-debt is satisfied.¹²⁶

The right of dower is heritable and the heirs are entitled to claim it even if the wife in her life time never demanded.¹²⁷

The right widow for retention of property for unpaid dower does not create a charge, mortgage or lien in the property if she loses

124. *Mst. Haliman Vs. Md. Manir*, AIR 1971 Pat 385 at pp. 389-390.

125. *Azizullah Vs. Ahmed*, (1885) 7 All 353.

126. *Imtiaz Begum Vs. Abdul Kasim*, AIR 1993 All 881.

127. *Abdul Wahab Vs. Mushtaq Ahmad*, AIR 1944 All 36; *Bashir Ali Vs. Hanif Nasir*, 4 IC 462.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

possession, the special right of retention is lost and she is at par with other unsecured creditors.¹²⁸

Right of wife to realize dower is heritable.¹²⁹

The right of dower is heritable and transferable while in possession of the husband's property in lieu of her dower-debt, the widow or divorcee can neither make alienation of that property nor marriage it. The right of retention or lien is not a charge on property. The husband in his life time may make a transfer of his property in favour of his wife in lieu of her dower debt, even though it has not become due but such transfer should not be fraudulent. Lastly, the widow or divorcee can use for recovery of her dower debt, even though in possession of husband's property.

Right of wife to realize dower is heritable.¹³⁰ Legal heirs of wife are entitled to claim dower, though wife had not demanded the dower while she was alive.

In case both husband and wife died, the legal heirs of wife are still entitled to claim, according to Islamic Law. Right is inheritable even if wife dies before consummation of marriage.

128. *Zaibunissa Vs. Nazim Hasan*, AIR 1962 All 197.

129. *Abdul Wahab Vs. Mushtaq Ahmad*, AIR 1944 All 36.

130. *Ibid.*

Chapter-V **MUSLIM WOMEN'S RIGHT TO *MAHR*** **ON THE DISSOLUTION OF MARRIAGE**

Discretion of remission by wife-

"And give the women on marriage their dower as a free gift, but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer."

Quran- Sura 4: Aayat 4

According to this provision the wife is free to either realize the whole amount of dower or remit the dower or any part of it of her own free will. The remission should be made without any consideration.

Acceptance of remission of the dower by the husband or his heirs is not compulsory. But if the husband refuses to accept the remission, then it returns to the wife.¹³¹

When the wife is under mental tension, such as her husband is on death-bed or has died, at that time if she makes a remission, her consent cannot said to be free.¹³²

The age of majority for the purpose of making remission should be 18 years as under the Indian Majority Act, 1875. But the Allahabad and Calcutta High Courts hold the opinion that the age of majority is to

131. *Nurannessa Vs. Khaje Mohd.*, ILR 47 Cal 537.

132. *Hasnumiya Vs. Halimunnissa*, AIR 1942 Bom 128.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

be determined under the Mohammedan Law i.e., on attaining puberty.¹³³

Remission can be made at any time after marriage whether it has been consummated or not. We remission of dower can be made before or at the time of marriage.¹³⁴

Indian Majority Act does not affect the discretion of a person "to act in the matter of marriage and dower", and as such a wife who has not attained majority according to the Act but has completed age of puberty may remit her dower.¹³⁵

If wife has not attained an age under the Indian Majority Act, even though she has attained puberty according to Islamic Law, she is not competent to relinquish her dower.¹³⁶

In a case it was held that wife was under great mental distress due to husband's death and remission made during such conditions cannot be said to be of her free consent.¹³⁷

133. *Qasim Hussain Vs. Bibi Kaniz*, AIR 1923 All 649; *Mazharul Vs. Abdul*, AIR 1925 Cal 322.

134. *Ali Vs. Md.*, (1918) 41 Mad 1026; *Najmunnissa Vs. Serajuddin*, 1939 Pat 133.

135. *Qasim Husain Vs. Bibi Kaniz*, AIR 1932 All 649; *Mst. Khadija Begum Vs. Nisar Ahmad*, AIR 1936 All 887; Mulla, Section 291.

136. *Najmunnissa Vs. Sirajuddin*, AIR 1939 Pat 133.

137. *Hasnumiya Dadamiya Vs. Halmmunnissa* (1942) 44 Bom LR 126.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

But in *Hasina Bano Vs. Alam Noor*¹³⁸ court hold that if agreement to relinquish the claim of dower bears the petitioners thumb impression then it cannot be held that the agreement was induced by coercion, fraud, undue influence, misrepresentation or mistake. Since in this case, petitioner was major, she had the capacity to enter into the agreement with her free consent. Thus, she is bound by the agreement. Once she has relinquished her right to receive the *Mahr* under valid agreement she is prevented from claiming the same.

Actionable claim- As an actionable claim it can be taken in execution of a decree like any other debt. It does not fall within the exception assignable property created by Section 6(e) of the Transfer of Property Act.¹³⁹ The prohibition being absolute, any transfer in defiance of provisions is calculated to defeat its provisions and as such is void.¹⁴⁰

A wife has got every right to file a suit for recovery of dower and in such cases she would obtain a money decree against all property, including the property of husband in her own possession, if any. Dower can be realized like any other debt.

138. AIR 2007, Raj, 49, RLW 2007 (1) Raj 566.

139. *Saibanbi Vs. Mohamudulli*, AIR 1941 Nag 8.

140. *Ameer Hassan Khan Vs. H. Mohd. Nasir*, AIR 1932 All 345.

Chapter-V **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE**

Dower is an actionable claim and can be taken an execution of a decree like any other debt, and it will not fall within the exception assignable property created by Section 6(e) of the Transfer of Property Act, 1882.¹⁴¹

It can be taken in execution of a decree like any other debt. It does not fall within the exception assignable property created by Section 6(e) of the Transfer of Property Act.¹⁴²

As an actionable claim it can be taken in execution of a decree like any other debt. It does not fall within the exception assignable property created by Section 6(e) of the Transfer of Property Act.¹⁴³

Dower is not a secured Debt- A dower debt could not be presumed to be similar to owelty, where a co-owner is entitled to an equal share in the shared property. This position is different from a money debt, because owelty has a priority over a mortgage debt.

While any heir of husband may claim a share in the property and a simultaneous claim of wife for dower debt, the wife would get a priority for satisfaction of her dower debt before any claim of legal heirs are satisfied.

141. *Saibanbi Vs. Mahamud Ali*, AIR 1941 Nag 8.

142. Ibid.

143. Ibid.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

Remedies which other unsecured creditors have in such a situation would equally be available to wife in case of transfer to wife in lieu of dower, no less no more.¹⁴⁴

The dower debt of Mohammedan widow is not, properly speaking a charge upon the property of her husband, and the interest which she has in the property in her possession in lieu of dower debt is therefore an interest restricted in its enjoyment to her personally within the meaning of Section 6(d) of the Transfer of Property Act, and as such is not capable of alienation.¹⁴⁵

A widow or divorcee is entitled to compensation for bearing to enforce her right of the dower-debt and such compensation is in the form of interest on the principal amount of the dower.¹⁴⁶

A widow must sue for recovery of the entire dower debt due to her at one time she cannot afterwards sue for the balance.¹⁴⁷

The dower cannot be called a loan as there has been no advance according to the provisions of U.P. Agricultural Relief Act.¹⁴⁸

144. *Ghiasuddin Babu Khan Vs. C.I.T., AP*, 1985 Tax LR 1058.

145. *Zobair Ahmad and another Vs. Jainandan Prasad Singh*, AIR 1960 Pat 147 at p. 148.

146. *Hamira Bibi Vs. Zubaida Bibi*, (1916) 43 IA 294.

147. *Kaneez Fatima Begum Vs. Ran Nanda Dhar Dube*, AIR 1923 All 331.

148. *Rehana Khatun Vs. Iqtidaruddin*, AIR 1943 All 134.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

A wife is not liable to be displaced by happening of any event not even her own death, because her heirs can claim the money if she dies and it is a debt within the meaning of Section 9(1) of the Provincial Insolvency Act.¹⁴⁹

If there are no other creditors for outstanding debts against the husband then dower debt would be recoverable before any other legacies are paid.¹⁵⁰

On the death of husband, dower debt can be recovered from his heirs, she like any other creditor institute a suit for her dower and can obtain a decree against the assets of her husband.¹⁵¹

A dower debt could not be presumed to be similar to owelty, where a co-owner is entitled to an equal share in the shared property. This position is different from a money debt, because owelty has a priority over a mortgage debt.¹⁵²

Discharge of claim of dower- A Muslim may discharge his duty to satisfy claim of dower before or after it becomes due, if the dower has not already been remitted by wife, in following manner:

-
149. *Bibi Janbi Vs. Abbar Ali*, AIR 1941 Nag 167.
150. *Nawab Begum Vs. Hossain Ali*, AIR 1937 Lah 589.
151. *Zamin Ali Vs. Azizunnissa*, AIR 1933 All 329.
152. *Hasan Bukhari Vs. Madan Chetty*, AIR 1956 AP 87.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

(i) **Cash payments** – A husband may discharge his duty to pay dower if he pays in cash either the whole amount or in parts, If simple payments were made in varying amounts from time to time by the husband but it was not allocated towards dower, neither the wife had accepted those amounts as dower, then these payments could not be said to have satisfied the dower debt. As such the amount or amounts paid should be expressly told to be towards satisfaction of dower debt.

A payment for satisfying dower debt of a minor or insane wife may be made to her, to her father, grandfather or other guardian.

A wife is not liable to be displaced by the happening of any event, not even her own death, because her heirs can claim the money if she dies and it is a debt within the meaning of Section 9(1)(b) of the Provincial Insolvency Act.¹⁵³

A Muslim widow's claim for dower is a simple money claim though that decree may be executed against the husband's property.¹⁵⁴

(ii) **In lieu of cash payment**- Such types of transfers are called Hiba-bil-Ewaz, where husband transfers a property to satisfy a claim of dower. A Muslim marriage is a contract of which dower is a consideration and

153. *Bibi Janbi Vs. Abbas Ali*, AIR 1941 Nag 167.

154. *Abdul Rahman Khan Vs. Inayati Bibi*, AIR 1931 Oudh 63; *Durga Das Vs. Mst. Hanifa Begum*, AIR 1940 Oudh 104.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

a transfer in lieu of dower is legal.¹⁵⁵ Such transfer in lieu does not affect Section 53 of the Transfer of Property Act, which is a separate provision from that of Islamic Law.¹⁵⁶

(iii) **Lieu of dower after death of husband-** After death of the husband widow's right to dower accrues and she is entitled to retain the possession of husband's property, if obtained lawfully and without force, may continue to retain the possession and it is called 'widow's right of retention', if dower remains unpaid.¹⁵⁷

Her right for retention of property for unpaid dower does not create a charge, mortgage or lien in the property. In the same case it was held that if she loses possession, the special right of retention is lost and she is at par with other unsecured creditors.

In case a widow is in exclusive possession of her husband's estate, other heirs are entitled to demand an account for rents and profits received by her out of that property. In such a case widow would be entitled to a compensation in the shape of interest of the dower debt.

155. *Suburannessa Vs. Sabdu Shaikh*, AIR 1934 Cal 693.

156. *Har Pd. Vs. Mohd. Usman Khan*, AIR 1943 All 2; *Bibi Kubra Vs. Jainandan Prasad*, AIR 1955 Pat 270; *Ameer Ali*, 1-211.

157. *Miroahidalli Vs. Rashid Beg*, AIR 1951 Bom 22.

Chapter-V **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE**

When the widow is retaining the possession, if she is dispossessed unlawfully, she may bring a suit for possession of the property within the limitation period provided by Limitation Act. Widow is also entitled to bring a suit for recovery of dower against other heirs, even though she is in possession of property, but in that case the widow has to surrender the possession she is holding in lieu of her dower debt.

In case a widow is in exclusive possession of her husband's estate, other heirs are entitled to demand an account for rents and profits received by her out of that property.¹⁵⁸

The right of retention accrues only on the death of husband or on divorce.¹⁵⁹

If a widow gets possession of the property and dies, her heirs are entitled to retain possession, as widow's lien is heritable and transferable.¹⁶⁰

However, the Privy Council has expressed some doubt whether the widow can assign either her dower or her right to hold possession.¹⁶¹

158. *Shaikh Salma Vs. Mohd. Abdul Kadar*, AIR 1961 AP 428.

159. Mulla Section 299.

160. *Cooverbai Vs. Hayabi*, AIR 1943 Bom 372.

161. *Maina Bibi Vs. Vakil Ahmad*, AIR 1925 PC 63.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

In *Kapoor Chand Vs. Kadar Unissa*,¹⁶² the Supreme Court has laid down the three propositions-

- (a) The widow is like any other creditor of the husband and cannot therefore, claim any priority for the dower debt over other creditors.
- (b) The widow's claim for dower-debt has priority over the claims of heir, and
- (c) The heirs of the deceased husband are not personally liable for the dower-debt of the widow; the amount can be realized rateably from their share in the estate.

Where the husband had not specifically hypothecated his property for the dower-debt, the widow's possession gave her no right as against a purchaser in execution of a decree for sale passed on a mortgage executed by her husband.¹⁶³

The lien which a Mohammedan widow has over the estate of her deceased husband for her unpaid dower is a purely personal one and does not descend to her heirs, although the right to the dower itself

162. (1959) SCR 747.

163. *Anieer Ammal Vs. Lankara Narayan Chatty*, (1901) IL 28 Mad 658.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

passes to them by succession. It follows, therefore, that they cannot take possession of the husband's estate under the claim for dower.¹⁶⁴

A purchaser of a deceased husband's estate from a Mohammedan widow, in possession thereof pending payment of her dower, was not entitled to plead non-satisfaction of her dower-debt to a claim by her husband's heirs for their share of his inheritance, as the widow's right to dower was personal to herself, and did not pass to a purchaser of the estate.¹⁶⁵

But a widow in possession of her husband's estate pending payment of her dower is not entitled to alienate it whether by sale or mortgage.¹⁶⁶

A Mohammedan widow, lawfully in possession of her husband's estate, occupied a position analogous to that of a mortgagee and her possession could not be disturbed until her dower-debt has been satisfied, and that after her death her heirs were entitled to succeed her

164. *Hadi Ali Vs. Akbar Ali* (1898) IL 20 All 262; *Muzaffar Ali Khan Vs. Parbati*, (1907) IL 29 All 640.

165. *Ali Muhammad Khan Vs. Azizullah Khan*, IL 6 All 50; See also *Ghufloorun Bibi Vs. Mustukeedeh*, 2 Agra 300 and *Azeemun Vs. Asgar Ali*, 2 Agra Part II, 167.

166. *Chuki Bibi Vs. Shamsunnissa Begum* (1894) IL 17 All 19.

Chapter-V **MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE**

in such possession, and if wrongfully deprived thereof, to maintain a suit for its recovery.¹⁶⁷

If a widow, who has obtained possession of a property in lieu of dower, is dispossessed by the heir of her husband, such heir would take the property subject to her lien for dower.¹⁶⁸

Even where the dower was unascertained, but the widows were in possession of their deceased husband's estate in satisfaction of their *Mahr*, they had a lien over it as long as any portion of the dower remained unsatisfied.¹⁶⁹

Where, however, she has obtained actual and lawful possession of the estate of her husband, under a claim to hold it for her dower, she will be entitled to retain possession until the debt is satisfied, with the usual liability for account to the heirs.¹⁷⁰

If she omits to put forward her claim for dower and assents to a person taking a legal, she cannot afterwards retract her assent.¹⁷¹

167. *Azizullah Khan Vs. Ahamudullah Khan*, (1885) IL 7 All 353.

168. *Umed Ally Vs. Safiahn* (1869) 3 BLR AC 175; *Janee Khanum Vs. Amatool Fatima* (1867) 8 WR 51 ; See also *Woomatul Fatima Begum Vs. Mariamunnissa Khanum* (1868) 9 WR 318; See also *Musst. Umatul Mehdi Vs. Musst. Kulsoom* (1907) 12 CWN 16.

169. *Ahmed Hussain Vs. Mussamut Khadija* (1868) 3 BLR AC 28 note; 10 WR 369.

170. *Mussamat Beebee Bachun Vs. Shekh Hamid Hussain*, (1871) 10 BLR PC 45; SC 14 MIA 398; See also *Amnatunnissa Vs. Bashirunnissa*, (1894) IL 17 All 77; *Muhammad Karimullah Khan Vs. AMani Begum*, (1865) IL 17 All 93.

171. *Reza Hossein Vs. Ifatoonnissa*, (1873) 24 WR 564.

Chapter-V MUSLIM WOMEN'S RIGHT TO *MAHR* ON THE DISSOLUTION OF MARRIAGE

Under the Mohammedan Law, there is no hypothecation without seisin, and therefore a widow has no absolute lien over any specific property of her deceased husband so as to enable her to follow it, as in the case of a mortgage, into the hands of a bona fide purchaser for value. As stated already, the widow's claim for dower is only a debt against the husband's estate, and has priority over legacies and the rights of heirs.¹⁷²

In *Md. Nayeem Khan Vs. Union Law Secretary*, Government of India, New Delhi, the relevant issue to be discussed does not require much elaboration of facts. Hence, the Author is not mentioning the facts and directly focusing the issue involved that whether the Muslim women entitled to retain possession of husband's immovable property even after divorce, until her dower debt is satisfied. The Court while settling the issue held that a Muslim widow is conferred with the right to retain property in lieu of payment of *Mahr* till it is paid off, whether she is divorced or her husband is deceased. Because Muslim law confers a right on the widow to retain the immovable Property of her late husband in her possession in lieu of payment of *Mahr* till the same is paid off. Possibly the same principle may be retended having regard to

172. *Wahedunnissa Vs. Shubratun*, (1870) 6 BLR 54.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

the rationale behind the same principle to cases where the divorced wife is in possession of a house of the husband or in regard to the matrimonial home where she is residing. She may be entitled to retain possession of the house of the husband who divorced her till the *Mahr* amount is paid off.¹⁷³

Remission of dower on condition- A wife has discretion of remission of her dower (besides provided under Article 9) in lieu of annuity of marriage.¹⁷⁴

It is open to a lady to relinquish her entire dower debt in whatever claim she had on account of the dower debts against the heirs of her husband.¹⁷⁵

The wife has the power to relinquish her whole dower or any portion of it in favour of her husband or his heirs only if the following conditions are fulfilled:-

- (i) **Time of Remission [Rule 95(i)]** - Remission can be made at any time after marriage whether it has been consummated or not. No

173. MANU/AP/05 516/2001

174. *Khadija Begum Vs. Nisar Ahmad*, AIR 1936 Lah 887; *Gulam Mohd. VS. Gulam Hosain*, AIR 1932 PC 81.

175. *Ram Prasad Singh Vs. Mst. Khudayatul Kubra*, AIR 1948 Pat 163.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

remission of dower can be made before or at the time of marriage.¹⁷⁶

- (ii) **Capacity for Remission [Rule 95(ii)]** – Only any major (adult) wife with sound mind can make a remission. Regarding the age of majority, the Courts have different opinions. According to Madras and Patna High Courts, the age of majority for the purpose of making remission should be 18 years as under the Indian Majority Act, 1875. But the Allahabad and Calcutta High Courts hold the opinion that the age of majority is to be determined under the Mohammedan Law i.e., on attaining puberty.¹⁷⁷
- (iii) **Consideration [Rule (iii)]** – Remission can be made even without consideration.
- (iv) **Free Consent [Rule 95(iv)]** – Remission should be made by the wife with her free consent. Consent is free when there is no coercion or undue influence. When the wife is under mental tension, such as her husband is on death-bed or has died, at that time if she makes a remission, her consent cannot be said to be free.¹⁷⁸

A remission of dower debt may be made conditionally, for example on execution of a Waqfnama.¹⁷⁹

176. *Ali Vs. Md.*, (1918) 41 Mad 1026; *Najmunnissa Vs. Serajuddin*, 1939 Pat 133.

177. *Qasim Hussain Vs. Bibi Kaniz*, AIR 1923 All 649; *Mazharul Vs. Abdul*, AIR 1925 Cal 322.

178. *Hasummiya Vs. Halimunnissa*, AIR 1942 Bom 128.

179. *Latafat Husain Vs. Hidayat Husain*, AIR 1936 All 573.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

It is open to a lady to relinquish her entire dower debt in whatever claim she had on account of the dower debts against the heirs of her husband.¹⁸⁰

A wife has discretion of remission of her dower in lieu of annuality of marriage.¹⁸¹

Standing surety for dower – Under the Muslim Law it is valid for a person, who is guardian of, whether husband or wife or both, to stand surety for payment of dower, although the wife may be minor. Even a stranger may make a contract for surety ship for payment of dower.¹⁸²

The consent to become a surety must be specific and express, as where a father is giving his consent for marriage only that does not automatically make him a surety for payment of dower debt.¹⁸³

In Shia Law when the marriage of an infant son is contracted by his father and the child is poor, the obligation rests entirely on the father, and in the event of his death must be discharged out of the

180. *Ram Prasad Singh Vs. Mst. Khudayatul Kubra*, AIR 1948 Pat 163.

181. *Khadija Begum Vs. Nisar Ahmad*, AIR 1936 Lah 887; *Gulam Mohd. Vs. Gulam Hosain*, AIR 1 1932 PC 81.

182. *Smt. Fatima Vs. Ahmad Ali*, AIR 1937 PC 121.

183. *Mohd. Siddiq Vs. Sahabuddin*, AIR 1927 All 364.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

whole of his property whether child should arrive at maturity and become wealthy or die before it.¹⁸⁴

It is valid for a person who is guardian (whether for husband or wife or both) to stand a surety for payment of dower although the wife may be minor.¹⁸⁵

Under Shia Law when marriage of an infant son is contracted by his father and child is poor, the obligation rests entirely on the father, and in the event of death of father the obligation would be discharged out of whole of his property whether child should attain maturity or even die before it.¹⁸⁶

Where a father is giving his consent for marriage only that does not automatically make him a surety for payment of dower debt.¹⁸⁷

Under the Muslim Law it is valid for a person, who is guardian of, whether husband or wife or both, to stand surety for payment of dower, although the wife may be minor. Even a stranger may make a contract for suretyship for payment of dower.¹⁸⁸

184. *Syed Sabir Hussain Vs. S. Farzand Hasan Khan*, AIR 1938 PC 80.

185. *Mst. Fatima Bibi Vs. Lal Din*, AIR 1937 Lah 45.

186. *Sayed Sabir Husain Vs. Farzand Hasan Khan*, AIR 1938 PC 80.

187. *Mohd. Siddiq Vs. Sahabuddin*, AIR 1927 All 364.

188. *Smt. Fatima Vs. Ahmad Ali*, AIR 1937 PC 121.

***Chapter-V* MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE**

Effect of apostasy- The effect of dissolution of marriage under a decree of the Court is regulated by statute. According to Section 5 of the Dissolution of Muslim Marriages Act, 1939, a married Muslim woman shall have same rights in respect of dower after dissolution of marriage under the Act as she may have (after dissolution of marriage, by way of talaq, faskh, etc.) under the Muslim Law. Hence, a Muslim woman whose marriage is dissolved under the aforesaid Act on the ground of apostasy of the husband is entitled to dower. The dissolution of marriage under the Act, even though made after apostasy of the wife, does not take away her right to dower and she is entitled to deferred (or half) dower even if the marriage is not consummated.

If a valid marriage has been dissolved (on account of the husband such as Divorce or Apostasy or any other act) before consummation of marriage:

- (a) The wife is entitled to receive one half of the specified dower settled at the time of marriage (settled before or at the time or after marriage under the Shia Law) excluding additions.
- (b) Where the dower is settled after the solemnization of a valid marriage and the marriage is dissolved (on account of husband) before consummation of marriage, such as apostasy then the wife

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

is entitled to a present only (under the Sunni Law), and to no portion of the dower.

- (c) If a valid marriage has been dissolved (on account of the husband such as divorce or apostasy or any other act) before consummation of marriage and the dower is not specified the wife is entitled to a present only and to no portion of the dower.
- (d) Where a valid marriage has been dissolved by the husband or the wife in exercise of an option of repudiation, before consummation of marriage the wife would get nothing.
- (e) If a valid marriage has been dissolved, on account of wife's Apostasy or adultery before consummation of marriage, the wife would get nothing.
- (f) The amount of present is determined on the basis of the social position, status and means of the husband.

On death of either party –

- (i) Under Sunni Law, on the death of either party to a valid marriage, irrespective of the fact whether the marriage is consummated or not the wife is entitled to receive either specified dower (including additions) settled before, or at the time of or after marriage or proper dower if the dower is not specified.
- (ii) Under the Shia Law, if either party to marriage dies before consummation and no dower has been specified, the wife would get nothing.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

In the case of valid marriage full specified dower or if it has not been specified then proper dower whether the marriage has been consummated or not because of the death of the husband or the wife marriage is rendered complete and everything becomes established and confirmed by its completeness.¹⁸⁹

Under the Sunni Law-

- (i) In the case of a valid marriage, whether the consummation of marriage has taken place or not, if the husband or the wife dies, the wife (If dies then her heirs) is entitled to full specified dower including prompt and deferred, which also includes any additions made after marriage. The Specified Dower may be settled either before marriage or at the time of marriage or even after marriage. [Rule 91(i)]
- (ii) In the case of a valid marriage whether consummated or not, if one of the party to marriage dies, and no dower is specified, then the wife is entitled to proper dower under the Sunni Law. [Rule 91(i)]
- (iii) Under the Shia Law, if either party to marriage dies before consummation, and if the dower is not settled, the wife is not entitled to anything neither dower nor present. And if it has been

189. *Malik Itikhar Wali Vs. Sarwari Begum*, AIR 1929 All 369.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

agreed to be specified later, then she is entitled to one half of dower [Rule 91(ii)].

A woman belonging to the Sunni Sect married to a Shia was entitled to the privileges secured to her married position by the law of her sect, and that she did not, by the mere fact of the marriage, become governed by the Shia Law, and that, consequently, where a husband sued to recover his wife, the one being a Shia and the other a Sunni, the wife's dower being exigible and not having been paid, the suit was not maintainable under the Sunni Law.¹⁹⁰

Jurisdiction of Court – The jurisdiction of the Court for filing the suit for dower is settled according to the cause of action i.e., if an agreement for dower at the time of marriage or a Dower-Deed is made or executed. The place where the agreement is made, or the Dower-Deed is created at the time of marriage will be the within jurisdiction of the Court where the suit will lie. The agreement between the husband and wife for payment of dower undoubtedly a part of the cause of action for maintaining a suit for its recovery and the place where such agreements entered into would be a place where a part of cause of action for such suit arises.¹⁹¹

190. *Nasrat Husain Vs. Hamidan*, (1880) IL 8 All 149.

191. *Smt. Nasra Begum Vs. Rijwan Ali*, AIR 1980 All 118 at p. 120.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

The Family Court has no jurisdiction to entertain a petition for sum of *Mahr* or dower filed by divorced Muslim women. Only Magistrate concerned can entertain such petition.¹⁹²

The absence of any power to Court for decreasing amount of dower has been judicially deplored.¹⁹³

The plea that suit for restitution of conjugal rights filed by wife, is not maintainable under the Mohammedan Law can be raised before Trial Court and not before Revisional Court.¹⁹⁴

If the marriage was celebrated abroad, and the parties were resident in England, even then the English Courts will refuse to recognize a divorce not obtained through a validity constituted Court of Justice.¹⁹⁵

Miscellaneous – In case of registered deed under Article 62 of the Limitation Act period of Limitation is 12 years if immovable property is hypothecated.¹⁹⁶

192. *Amjuon Hasan Siddiqui Vs. Smt. Salma B.*, AIR 1992 All 322.

193. *Mohd. Sultan Begum Vs. Sarajuddin*, AIR 1936 Lah 183.

194. *W. Sirajuddin Vs. Shaziya*, AIR 2003 Kant 224 : 2003 (2) DMC 618.

195. *Shaw Vs. Gould*, (1868) LR 3 HL 55.

196. *Mazharul Vs. Azimuddin*, AIR 1923 Cal 507.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

If Talaq once becomes effective, the mere fact that the parties lived together and the talaq again given would not prevent the running of time from the date of first talaq.¹⁹⁷

In case of consummated marriage, the dower will not be lost in any case even by apostasy or other misconduct of wife such as committing adultery or concealing illicit pregnancy or even by the murder of husband by her.¹⁹⁸

The widow's right of retention is to some degree analogous to mortgage yet there is no real analogy between the two.¹⁹⁹

If it is admitted that dower was specified, but there is no satisfactory evidence of it, the burden of proof being on wife only, the amount admitted by the husband to have been settled may be allowed.²⁰⁰

The widow is entitled to equitable compensation by way of interest on dower, as she is creditor of the husband.²⁰¹

197. *Mst. Hayat Khatun Vs. Abdullah Khan*, AIR 1937 Lah 270.

198. *Kulsambi Vs. Abdul Kadir*, AIR 1921 Bom 205.

199. *Mst. Maina Bibi Vs. Vakil Ahmad*, AIR 1925 PC 63.

200. *Mst. Bhuri Vs. Asgari*, AIR 1926 Lah 458.

201. *Mst. Maimunia Vs. Sarafatullah*, AIR 1931 All 403.

Chapter-V MUSLIM WOMEN'S RIGHT TO MAHR ON THE DISSOLUTION OF MARRIAGE

The Court have however, some discretion in determining whether interest should be allowed in case of dower.²⁰²

In view of the above discussion, it may be concluded that *Mahr* is the absolute property of the wife and descends like any other property that she may possess. She has right to alienate it to any other person. Ordinarily, it seems that *Mahr* as property rests in the wife of the time of nikah, irrespective of the fact whether it is specified or not. Therefore, after nikah, the wife should have the right to assign it at any time.

Mahr has been held to be transferable by all the courts in India. Though there exists difference of opinion about the transferability of the widow's right of retention. So *Mahr* itself can be good subject of transfer and Muslim law by way of both testamentary disposition and disposition *intervivos*. Hiba of *Mahr* is not an uncommon practice in Muslim society. However, the testamentary disposition of *Mahr* has been rare. *Mahr* can constitute a valid subject of will and it will be governed by the general rules of Muslim law related to will.

202. *Niwasi Begum Vs. Dilafroz*, AIR 1927 All 39.

CHAPTER-VI

STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

- Statutory Provisions relating to *Mahr*:
- Definition of *Mahr*
- Nature of the Right to *Mahr*:
- Subject matter of *mahr*
- Quantum of *Mahr*
- Specified and 'Proper' *mahr*
- Bride's consent to *mahr*
- Disputes about *mahr* amount
- Increase or decrease in the amount of *mahr*
- Time for payment of *mahr*
- Enforcement of *mahr*:
- *Mahr* and irregular (*fasid*) marriages
- *Mahr* and marriage consummation
- *Mahr* as damages for breach of betrothal
- Return of *mahr*
- *Mahr* and equality of spouses (Kufu)
- *Mahr* and Khula'
- *Mahr* and *Faskh*
- Procedure for payment of *mahr*
- *Mahr* and anti-dowry legislations

Chapter-VI STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

The basic foundations of law of mahr are found in the Quran and hadith. The task of working out further details was performed by jurists of Islamic law. Some local practices have also found place in the law on mahr. Now in various Muslim countries some codification of personal laws has taken place, which covers the subject of Mahr too. Thus, the law on mahr is present by constituent upon the Quranic directives, hadith, juristic exposition, some local practices and the modern legislation to improve the social and economic condition of Muslim Women,¹ but here the stress is given on the economic security of Muslim Women in different Islamic Countries. The concept of *Mahr* which has been an integral component of marriage under the Islamic Law has also changed from price of women to token of respect. *Mahr* under the present Islamic system 'is a 'gift' which a Muslim husband is bound to present his wife on marriage as a symbol of honour, respect and affection. It manifests the Islamic policy of equitable marital status and property rights of women and invokes friendship, sincerity, tolerance and respect in reciprocity. Its significance can be better appreciated in the context of the nature of women and the historical unfolding of their miseries and deprivation. Islam describes men and

1. Dr. M. Azal Wani, *The Islamic Institution of Mahr* at p. 215.

Chapter-VI STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

women as each other's "garment" and "potential" with just position for both, in the matrimonial home as well as in the society. It negates the concept of merger of the personality of the wife into that of her husband on marriage. Under Islamic Law *mahr* is legally enforceable and any breach of it warrants legal action.

Law relating to *Mahr* derives its basic foundation from the Quran and hadith. The task of working out further details has been performed by the jurists of Islamic Law. Some local practices have also found place in the law on *mahr*. Now in various Muslim countries, during the present century, some sort of codification of personal laws has taken place which covers the subject of *mahr* as well. Thus, the law on *mahr* is presently constituent upon the Quranic directives, Hadith, juristic expositions, local practices and the modern legislations. This chapter shall underline the relevant areas of the subject, which have been brought under legislation and assess the merit and utility of this legislative effort.

Statutory Provisions relating to *Mahr*:

It is pertinent to note that still no Muslim country has a complete set of statutes on *Mahr*. But, the provisions from relevant enactments of

Chapter-VI STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

different countries plus the Ottoman Law of Family Rights, 1971, taken together constitute a considerable body of regulations which covers most of the notable aspects of *mahr*. These aspects may be taken for examination, under the following heads:

1. Definition of *Mahr*

Morocco

Of all the relevant legislations in various Muslim countries the Moroccan code of Personal Status, 1958 enjoys the distinction of giving a definition of *mahr*, which reads as follows:

*"Mahr means any property given by the husband to the wife representing his intention to have a family based on mutual affection and company."*²

The definition is appropriate and conforms to the main purpose of *mahr* in Islamic law, i.e., to have a peaceful and happy home. When the husband presents *mahr* to the wife, it creates in her a feeling of familiarity and affection about the matrimonial home, making a comfortable abode for both. Quran has also described *mahr* as a "gift spontaneous" (a gift with a willing heart).

2. The Moroccan Code of Personal Status, 1958, Section 16.

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

2. Nature of the Right to *Mahr*:

Mahr as a symbol of conferment of property rights on women by Islam exclusively belongs to the wife. She, therefore, enjoys absolute ownership over the subject matter of *mahr*. This principle has now attained statutory form in many Muslim countries.

Lebanon

About the nature of *mahr*, the Ottoman Law on Family Rights,³ as applicable in Lebanon, says:⁴

"Mahr is the property of the wife; she cannot be compelled to make provision of the house hold goods from it".

Morocco

Regarding nature of *Mahr*, the Moroccan code provides:⁵

"Mahr is the property of the wife which she can dispose of as she wants. The husband cannot set-off any part thereof against any house hold goods given by him to the wife."

It further declares:

*"The father or guardian of a bride cannot demand from the husband any money for handing her over to him or for acting as guardian."*⁶

3. Basically the Ottoman Law on Family Rights, 1917 has been adopted in Lebanon and is applicable to the Muslims in Israel also.

4. Ottoman Law on Family Rights, Article 89

5. Supra 1

Chapter-VI STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

Tunisia

Tunisian Uniform Code of Personal Status, 1956-81, also embodies the same principle in following terms⁷-

"... Mahr is wife's property which she may dispose of as she wishes."

3. Subject matter of *mahr*

According to the classical authorities *mahr* can be any property (*mäl*), monetary or non- monetary, having value. Where it is non-monetary the thing to be given must be certain. *Mahr*, however, cannot be a mere promise to do or to abstain from doing something not enforceable by the court.⁸ Legislations in this respect are found in Morocco and Tunisia.

Morocco

The Moroccan code clearly says:⁹

"Anything that may be the subject of legal obligation may form the mahr..."

Tunisia

The Tunisian code is more illustrative on the point, which says:¹⁰

"Anything which is lawful and has a monetary value may form the mahr, it cannot be a valueless thing..."

6. Ibid

7. Tunisian Uniform Code of Personal Status, 1956, Article 12

8. Tahir Mahmood, *The Muslim Law of India*, P. 72 (Allahabad, 1980).

9. Article 17

10. Article 12

Chapter-VI STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES

These statutes conform to the established norms of the Shariah; but, with regard to the traditional controversy, like whether the personal services of a husband can constitute *mahr* or not, the modern statutes are not expressly clear. It, however, appears that the husband's personal services for a determinate period can form a valid subject of *mahr*. Teaching of the Quran or providing any other educational facility to the wife can also, under these statutes, be treated as a valid subject of *mahr*.

4. Quantum of Mahr

The parties to a marriage are, under Shariah free to determine the quantum of *mahr* themselves by mutual consent. There is no hard and fast rule about it. However, the Hanafis insist on a legal minimum of ten dirham's (equivalent to 2.97 grams of silver). The Shafi'is do not insist upon the legal minimum but, they are recommending it. With regard to maximum *mahr*, none of the schools of Islamic law prescribes any limit. Whatever is agreed upon (howsoever high), is payable.¹¹ The position under the statutory laws in Muslim countries is diverse. Some

11. *Supra* note 9 at p. 73.

Chapter-VI STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES

countries have in this respect followed the traditional principles while & others have shown a clear deviation from those norms.

Morocco

Regarding quantum of *mahr*, the Moroccan code has adopted the principle of complete freedom of stipulation. It envisages as follows:

*".....there is no maximum or minimum thereof".*¹²

Lebanon

The Ottoman Law as applied in Lebanon, provides:

*".....any amount may be specified as mahr".*¹³

Tunisia

With respect to the minimum *mahr* the language of the Tunisian code is more guarded than the Moroccan and Lebanese statute. It reads as follows:

*".....it cannot be a valueless thing, nor is its maximum 'limited...'"*¹⁴

Yemen

In the former state of South Yemen deviating from the classical law, an upper limit of *mahr* has been fixed. The family law of Yemen(S), 1974 provides:

12. Article 17

13. Article 80

14. Article 12

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

"The mahr inclusive of both prompt and deferred parts shall not exceed one hundred dinars".¹⁵

Somalia

This provision is condemnable because ceiling of the upper and the lower limit cannot be accepted. It should be fixed amicably with the concept of both the parties to marriage. In Somalia, the Family Code, 1975 has also provided, for the ceiling of *mahr*. It says:

"The bride shall be entitled to mahr as determined at the time of marriage. The upper limit for mahr is SO SH 1000 or its value in kind".¹⁶

In principle the wife's right to *mahr* in Shariah is protected by Somalian enactment. It, however, includes two such innovations, which make this right a mere token. It is provided that it must be fixed at the time of marriage, leaving no room for *mahr-al-mithl* and there will be an upper ceiling of one thousand Somali shillings (or its equivalent in kind) on *mahr*.¹⁷ This ridiculous ceiling (SO SH 1000 £80, i.e., 1500 IR) defeats the very purpose of *mahr* under the socio-legal strategy of Islam.¹⁸

15. Article 18

16. Article 24

17. II Islamic CLQ, 250, 255 (1982)

18. Ibid

Chapter-VI **STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES**

5. Specified and 'Proper' *mahr*

Mahr, with respect to a marriage, may be fixed by the parties before, at the time of, or after the marriage. Such *mahr* is called as *mahr-al-musamma* (specified *mahr*). When the *mahr* is not specified by the parties to a marriage, a proper amount becomes payable to the wife as *mahr*. This is called as *mahr-al-mithl* (*mahr* of the like or 'proper *mahr*'), which is determined with reference to the *mahr* of the other women in the wife's father's family and her personal qualities like age, beauty, virginity, education, character, social status, etc. The choice between the specified *mahr* and the proper *mahr* has generally been retained by the modern legislations in Muslim countries.

Iraq

The Iraqi Code of personal status 1959-84 provides:

*"A woman is entitled to the mahr specified in the contract, if it has not been specified she shall get the proper mahr (mahr-uf-mithl)".*¹⁹

Lebanon

The relevant provisions of the Ottoman law read as follows:²⁰

"Mahr can either be specified (mahr al musamma) or it may be proper mahr (mahr al mithl). Proper mahr in respect of the women

19. Article 19(1)

20. Article 80

Chapter-VI STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES

shall be that of her equals on her paternal side, and if there is no such person it shall be equal to that of the women of her status in her town....."

Somalia

Contrary to above, the Somalian Code does not approve of the choice between proper and specified *mahr*.

It says:²¹

"The bride shall be entitled to mahr as determined at the time of marriage".

Sudan and Egypt

In case of certain disputes about quantum of *mahr* the enactments of Sudan and Egypt make proper *mahr* payable to the wife.²²

6. Bride's consent to *mahr*

The woman, under Islamic law, has a right to accept or reject an offer of marriage. She similarly, has a right to agree or refuse certain terms and conditions to the marriage put forward by the other side. Thus, she may not agree to a certain amount of *mahr*. Some modern statutes have taken note of bride's consent as an essential for *mahr* fixation. Of course, this is most sensible provision.

21. Article 24

22. See *infra* in this Chapter 'Disputes about mahr'

Chapter-VI **STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES**

Sudan

The Sudanese Law on Marriage and Guardianship, 1960, provides as follows:²³

The consent and approval of a girl who has attained puberty is essential for the choice of her husband as well as for the amount of *mahr*.

It further declares:²⁴

Silence of a virgin on the choice of the bridegroom and the amount of *mahr* shall amount to her consent and her assertion that she did not know that silence would mean consent shall not be accepted unless she is mentally weak.

Morocco

The Moroccan Code, though with a different purpose, accepts the bride's consent as an essential for *mahr* fixation. It says:²⁵

"Where a legally major girl agrees to mahr which is less than her proper mahr (mahr al mithl) her guardian can not object to it."

23. Article 6(a)

24. Article 6(c)

25. Article 23

Chapter-VI STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

So it is generally accepted that the bride's consent is essential for the *mahr* fixation. It may, however, be pointed out that the rule, that a bride can accept *mahr* which is less than her proper *mahr* against the wishes of the guardian, is subject to serious doubt. Such acceptance of lower *mahr*, can affect the rights of the other women in the family of the bride which the guardian may ordinarily not allow.

7. Disputes about *mahr* amount

Regarding the proof of *mahr*, the nikahnamas, kabinnamas, and the oral statements have been the main sources of evidence. Where no proof is available about the amount of *mahr*, whether the wife will be entitled to proper *mahr* or any other amount is not expressly clear from the classical authorities. Now the modern legislations appear to have tried to evolve some principle in this respect. It is submitted that in such cases proper *mahr* should be fixed by the Court.

Egypt

:

The relevant provision in the Egyptian Law on Personal Status, 1929-85 reads as follow:

If there is a dispute between the spouses regarding the amount of *mahr*, the wife shall be asked to prove her claim. If

Chapter-VI **STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES**

she fails to do so, the statement on oath made by the husband shall be accepted unless he states an amount, which cannot be normally supposed to be the *mahr* of the women of her status, in which case the proper *mahr* of the wife shall be binding on him. Same rule shall apply where parties to the dispute relating to *mahr* are one of the spouses and the heirs of the other or the heirs of both the spouses.²⁶

Sudan

The Sudanese Law on Talaq, Marital Disputes and Gifts 1935 provides as follows:²⁷

Where there is a dispute regarding the amount of *mahr*, unless the wife can prove, otherwise, the husband's statement on oath shall be accepted, but if he states an amount which cannot normally form the *mahr* of a woman of the wife's status the proper *mahr* shall be binding on him.

Lebanon

The relevant Ottoman Law provides:²⁸

Where there is a dispute as to the specification of *mahr* and its amount cannot be established, the proper *mahr* shall be payable. If the spouse who claims that it was specified is the wife, the proper *mahr* so

26. Article 19

27. Article 10

28. Article 86

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

payable shall not exceed the amount claimed by her, but if that spouse is the husband, the proper *mahr* shall not be less than the amount claimed by him to have been specified.

It further says:²⁹

"where the amount of specified mahr is disputed and the husband claims it to be an amount which is customary, his word shall be accepted."

About these provisions it has been pointed out by some writers that *"on this point, Qadi Abu Yusuf's simple view has been enforced in supersession of other Hanafi opinions."*³⁰ A-side of it, a clear reading of these provisions shows that where actual amount of specified *mahr* cannot, after the statements of husband and wife, be proved, proper *mahr* will be due to the wife. This is fair.

Jordan

As a matter of fact the proper maintenance of nikahnamas, kabinnamas and marriage registers can help in avoiding disputes about the quantum of *mahr* and other related matters. The Jordanian code of

29. Article 87

30. i) Tahir Mahmood, *Family Law Reform in Muslim World*, ILI, 1972, p. 39
ii) Tahir Mahmood, *Personal Law in Islamic Countries*, ALR, 1987, New Delhi
iii) Anderson "Recent Developments in Shariah Law", 42 Muslim World (1952), 187.

Chapter-VI STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

Personal Status, 1976 has made such maintenance of records compulsory in following words:³¹

"A dispute concerning mahr shall not be entertained if the claim made in this respect is different from the entry in the certificate of marriage or is not provided by written evidence".

Syria

The Syrian Law has taken a fair note of another important situation: where the stipulated *mahr* may be claimed to be fictitious or fraudulent. In article 54(iv) it is provided:

"Where it is claimed that the stipulated mahr is fictitious or fraudulent, either party can prove it. If the said mahr is not proved to be real, the judge shall enforce proper mahr."

8. Increase or decrease in the amount of *mahr*

The traditional law allows increase and decrease in *mahr* by the husband and wife respectively, at any time during the marriage. The Shafi'is treat addition in *mahr* as *hiba* and, therefore needs for its validity the delivery of possession. The Hanafis and Shias on the other hand, treat it as a condition that becomes incorporated in the original

31. Article 51

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

agreement. Though in a single country, this aspect of *mahr* has also come under modern legislation.

Syria

The Syrian code of Personal Status, 1953 incorporates the following provisions in this respect:³²

"Increase or decrease in the amount of mahr, whether during the subsistence of marriage or during iddah, shall be void if not made in the court where this is done by mutual consent, the action must be duly registered with the qazi."

The provisions prescribe the following requirements for the validity of any increase or decrease in the amount of *mahr*:

- a) Increase or decrease in the amount of *mahr* must take place with mutual consent of the parties to the marriage.
- b) Such an increase or decrease must take place in the court.
- c) Such an action must be duly registered with the qazi.

It is evident that in Syria any increase or decrease in *mahr* can validly be made only when these statutory requirements are followed. It also implies that the relinquishment of *mahr* by the wife cannot be effective unless it takes place in conformity with the said provisions.

32. Article 57

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

9. Time for payment of *mahr*

The basic spirit of *mahr* demands that the husband must be very prompt in presenting it to the wife. However, for sufficient reasons the payment of *mahr* may be deferred with the free consent of the wife. In this respect the jurists have developed following optional propositions for adoption by the parties:

- a) The whole *mahr* may be made payable at the time of marriage, soon, thereafter or on demand (*indat-talb*). Such *mahr* is called *mahr-al-muwajjal* (prompt *mahr*).
- b) The whole *mahr* may be made payable on the happening of a specified event (e.g., death, divorce or a specified period of time). Such *mahr* is called *mahr ghayr mu'ajjal* (deferred *mahr*).
- c) A specified portion of *mahr* may be made payable as in (a) and the rest as in (b).

In this respect the Ottoman Law provides:

*"The specified mahr may be made either prompt (mu'ajjal) or deferred (muw'ajjal) wholly or partly."*³³

Where no time is specified for the payment of *mahr* or where its nature described only in general terms and it is not clear as to how much of *mahr* is *mu'ajjal* and how much *ghayr mu'ajjal*, such *mahr* is

33. Article 81

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

known as *mahr ghayr muqatta*. In such cases under Shia law the whole *mahr* is treated as *mu'ajjal*, while as under *Hanafi* law the portion of *mahr* to be *mu'ajjal* is determined with regard to the personal qualities of the wife, the quantum of *mahr* fixed and '*urf*' (custom). The position under modern statutes in Muslim countries is given below.

Pakistan and Bangladesh

*"Where no details about the mode of payment of mahr are specified in the nikahnama or the marriage contract, the entire amount of mahr shall be presumed to be payable on demand, that is prompt."*³⁴

This rule of presumption, as pointed out by Professor Mahmood, is supported by the Ithna Ashari School of Islamic Law.³⁵

Iraq

- (1) *"Mahr may be made either prompt or deferred, wholly or in part; where no specific provision is made, custom shall prevail."*
- (2) *"The period fixed in the marital contract for the entitlement of the deferred mahr shall lapse on death or divorce."*³⁶

Jordan

*"It is lawful to make the mahr prompt or deferred, the whole or part of it as specified in the certificate of marriage, when it is not so specified to be deferred, it shall be regarded as prompt."*³⁷

34. Section 10, Muslim Family Laws Ordinance, 1961, applicable both in Pakistan and Bangladesh which have common legal history upto 1971

35. Supra note 31 (i)

36. Article 20, Iraqi Code of Personal Status 1959-83

Chapter-VI **STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES**

Somalia

The Somalian Statute, referred to a boy prescribing an upper ceiling for *mahr* at one thousand Somali shillings, has also an impact on the time for payment of *mahr*. Professor Tahir Mahmood comments on this as follows:³⁸

"It also makes quite meaningless the Somali statutory protection of the traditional rules relating to choice between prompt' and 'deferred' mahar, the wife's right of remitting mahar and the amount of mahar payable in the cases of marriage dissolved before consummation."

10. Enforcement of *mahr*:

(a) Prompt *mahr*: The classical works on *fiqh* contain rules about the enforcement of *mahr* prescribing measures for making the husband to discharge this duty towards the wife. According to these authorities, the wife has a right to deny her person to the husband until she receives her prompt *mahr*. But the question that whether the wife can exercise this specific right for non-payment of prompt *mahr* even after the consummation of the marriage is not finally settled by the traditional authorities. Imam Abu Hanifa has replied this query in affirmative but

37. Article 45, Jordanian Code of Personal Status, 1976

38. Supra note 18

Chapter-VI STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

according to the disciples (Imam Abu Yusuf and Imam Mahammad Shaybani) the wife continues to hold such right after consummation only if the cohabitation with her has taken place under compulsion or she is an infant or insane. The controversy can now be settled by statutes at different places. The present statutory position in some Muslim countries is as given below.

Jordan

*"Where the wife has received her mahr, or where the parties have agreed to defer the payment of mahr for a stipulated period, the wife cannot refuse consummation of a marriage."*³⁹

This shows that in Jordan before the payment of prompt *mahr* the wife can refuse consummation of the marriage but she cannot do so after having received her *mahr* or where payment of *mahr* has been deferred for a stipulated period. It, however, appears that where the *mahr* has been deferred for an indefinite period of time the wife shall have a right to refuse consummation of her marriage so long it remains unsatisfied or some specific agreement is reached between the parties.

Now where the marriage has been consummated before the payment of *mahr* or before any stipulation about the time having been

39. Article 43, Jordanian Law of Family Rights, 1951

Chapter-VI **STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES**

set between the parties, the wife is entitled to refuse society to the husband for non-payment of *mahr* after such consummation of marriage. About the refusal of her society to the husband the Jordanian code provides in unqualified terms.

*".... she will have the right to refuse to join him if he has not paid her prompt mahr".*⁴⁰

About the wife who has received her prompt *mahr* the Code clearly lays down.⁴¹

A wife having been paid her prompt *mahr* shall obey her husband and live in his house and go with him wherever he goes even if out of the country, provided that her safety is assured and no condition to the contrary has been registered in the certificate of marriage. Where she refuses to obey him, her right to maintenance will lapse.

The Jordanian law gives an additional right to the wife to claim dissolution of marriage on account of non-payment of prompt *mahr*, provided her marriage is still unconsummated.

40. Article 67

41. Article 37

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

It provides:⁴²

Where a marriage has not been consummated and the husband is unable to pay the prompt *mahr*, the wife can bring an action for the dissolution of the marriage. The *qadi* shall thereupon give one month's time to the husband and if he fails to pay it within that period, the marriage may be dissolved. If in such a case the husband is absent, or if his whereabouts are not known, or if he has no property in the place, the marriage may be dissolved forthwith.

Syria

The Syrian Code makes it incumbent upon the wife to live with her husband after receiving her prompt *mahr*. It envisages:

*"The wife must, after receiving her prompt mahr reside with her husband."*⁴³

".... the wife shall have a right of refusal to join him if the husband has failed to pay the prompt mahr...."

This leads to the inference that the wife can refuse to live with the husband for non-payment of prompt *mahr*. There is nothing, in this

42. Article 55, supra note 39

43. Article 66, 72

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

provision, to show that the wife cannot do so after the consummation of marriage. The Syrian Code has made clear, a very important point that:

"The law of set-off shall not apply to prompt mahr even if permitted by the wife" ⁴⁴

Lebanon

The Ottoman Law provides:

"The wife is bound, after receiving her prompt mahr to reside in the house of her husband and to travel with him if he wants to shift to another town, unless there is any legal obstacle." ⁴⁵

In effect the provision is similar to that in Syrian Code.

Tunisia

The relevant Tunisian statute provides:⁴⁶

"The husband cannot unless he pays the mahr force the wife to consummate the marriage. After a marriage is consummated, mahr shall constitute an unsecured debt of which only the wife can claim payment."

It is clear from this provision that in Tunisia the woman cannot be compelled by the husband to consummate the marriage before the

44. Article 60 (ii)

45. Article 71

46. Article 13

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

payment of *mahr*. In other words, the wife, under this statute can refuse her person to the husband for non-payment of *mahr*.

Morocco

The Moroccan code contains a complex provision about the enforcement of *mahr* which reads as follows:⁴⁷

"Where there is a dispute between the spouses as to the payment of mahr the wife's claim shall be accepted if the dispute arises before consummation of marriage. But if it arises after that, the husband's statement shall be accepted."

The provision, among other things, implies that the wife can refuse consummation of marriage on account of her demand for *mahr* from the husband only before submitting herself to him.

Iraq

Iraqi Code not only justifies that wife's refusal of the society to the husband for no-payment of prompt *mahr* but also protects her right to maintenance during this period.

It says:⁴⁸

"(1) Maintenance of wife is obligatory on the husband even if she is living with her parents, except when the husband wants her

47. Article 24

48. Article 23

Chapter-VI **STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES**

to come to his house and she refuses to do so without any excuse.

(2) *The wife's refusal shall be valid if the husband has withheld her prompt mahr ..."*

b) Deferred *mahr*

Deferred *mahr* can be enforced just after the expiry of the stipulated period of time (if any) or on the happening of a certain event specified for the purpose. Where the payment of *mahr* has been deferred without any mention of a specified period or event, it can be claimed on the dissolution of marriage, either by the act of the parties or by death. However, Imam Abu Yusuf has opined that where *mahr* has been deferred for an indeterminate period, the wife can claim its payment immediately in definite demand, provided the marriage has not already been consummated. A situation may arise where the payment of *mahr* has been deferred for a specified period of time or upto the happening of a specified event (other than marriage dissolution) but the dissolution of marriage takes place before the expiry of such time period, it appears, that the *mahr* will become, enforceable just after such marriage dissolution. Iraq Provisions are found in this respect in Iraqi Code and Ottoman Law.

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

The Iraqi Code declares:⁴⁹

"The period fixed in the marital contract for entitlement to the deferred mahr shall lapse on death or divorce."

Lebanon

The position under the Ottoman Law has been that the condition of time for the payment of deferred *mahr* lapses only on the death of the husband and not on divorce. But where no determinate period has been fixed for deferred *mahr*, it can be enforced on the death of either party or divorce. The Ottoman Law provides:⁵⁰

"Where the period for the payment of deferred mahr has been fixed, the wife cannot claim its payment before that time even if a divorce takes place; but if the husband dies the period so stipulated lapses. If no period is specified for the payment of the deferred mahr, it shall be deemed to be deferred till the occurrence of the death of either party or divorce"

Pakistan and Bangladesh

The family Laws Ordinance, 1961 applicable in these countries makes in its Section 6(5) (a) *mahr* immediately payable if the husband takes another wife without prior permission.

49. Article 20 (2)

50. Article 82

Chapter-VI **STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES**

The section reads as:

"Any man who contracts another marriage without the permission of the Arbitration Council shall -

Pay immediately the entire amount of mahr whether prompt or deferred, due to existing wife or wives, which amount if not paid shall be recovered as arrears of land revenue."

11. *Mahr* and irregular (*fasid*) marriages

For an unconsummated irregular marriage, no *mahr* is due to the wife. However, on its consummation the specified or proper *mahr*, whichever is less, becomes payable to her. "Presumptive consummation" (*Khalwat-e-Sahih*), recognized by *Hanafi*, *Maliki* and *Hanbali* laws is for the purpose of *mahr*, not equated with actual consummation. Thus, in cases of irregular marriages the wife becomes entitled to *mahr* only after actual consummation. Provisions are found in this respect in some enactments also.

Syria

The Syrian Code recognizes the above principle in following terms:⁵¹

- (1) An irregular marriage if not consummated shall be like a void marriage,

51. Article 51

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

- (2) If it is consummated it shall give rise to:
- the proper or the specified *mahr* whichever is less.

Iraq

The Iraqi Code provides as follow:⁵²

Where separation takes place after consummation of an invalid marriage, the specified *mahr* or the proper *mahr*, whichever is less, shall be binding; where no *mahr* has been specified in such a case, the proper *mahr* shall be payable.

Lebanon

The Ottoman Law contains detailed provisions about the matter.

The full text of these provisions is as given below:⁵³

"A void marriage whether consummated or not, and an irregular marriage if not consummated, shall have no legal effects of a valid marriage on the basis of any such marriage the parties shall have no rights and obligations of a valid marriage, e.g., mahr, paternity, iddat, bar of affinity and mutual inheritance."

"If an irregular marriage is consummated, it shall give rise to the rights of mahr, iddat, paternity and bar of affinity, but it shall not establish the rights of maintenance and mutual inheritance."

52. Article 22

53. Article 75-76

Chapter-VI STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES

The Ottoman Law, therefore, makes the position of *mahr* clear both in irregular as well as in void marriages. It further provides in specific terms that:⁵⁴

where separation takes place after consummation of a marriage which is irregular and the *mahr* had been specified, such *mahr* or the proper *mahr* whichever is less shall be payable, where, in such a se, *mahr* had not been specified or had been incorrectly specified, the proper *mahr* shall be binding, if separation takes place before such a marriage is consummated, nothing shall be payable as *mahr*.

12. *Mahr* and marriage consummation

The right to the entirety of *mahr* vests in the wife only when the marriage has been consummated⁵⁵ or when either of the parties to a subsisting marriage dies before consummation. Now where dissolution of marriage takes place before the consummation of marriage the extent of the wife's entitlement to *mahr*, according to the Quran, will depend upon the fact whether the *mahr* was fixed or not. It provides that where a women has been divorced before the consummation of marriage and without fixation of *mahr*, no *mahr* is payable to her, but a 'gift' or 'present' called *mata'*, which under Hanafi law cannot be more than

54. Article 85

55. Article Actually or presumptively (under *Hanafi*, *Maliki* or *Hanbali* laws)

Chapter-VI STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES

half of *mahr* is due to her. On the other hand, where the woman has been divorced before consummation of marriage but after the fixation of *mahr*, she will be entitled to half of it. However, the wife may freely remit her half of the *mahr* also, or the husband may pay full *mahr* to the wife.⁵⁶ The modern legislations have embodied certain rules about the matter.

Lebanon

The Ottoman Law provides:⁵⁷

Where the *mahr* has, in a valid marriage been specified, its payment in full becomes binding on the death of either spouse or on divorce after valid retirement (Khalwat al Sahih). If a divorce occurs before such retirement, half of the specified *mahr* shall be payable, where separation takes place on the initiative of the wife, e.g., where her guardian claims dissolution of the marriage on the grounds of inequality of the husband, the *mahr* shall lapse in full where no *mahr* is specified in a valid marriage contract or is specified but the specification is incorrect, the proper *mahr* shall be payable on the death of either spouse or on the occurrence of divorce after valid retirement'; when a

56. The Quran II: 236-237

57. Article 83-84

Chapter-VI STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES

divorce occurs, in such a case, before valid retirement a mata' (consolatory gift) shall be payable. The amount of mata' shall be determined in accordance with custom and usage but it shall not exceed half of *mahr*.

The rule about mata' in this provision conforms to the Hanafi view of the Law.

Jordan

The Jordanian Code embodies the rule in following terms:⁵⁸

Where divorce takes place before mahr is stipulated or before consummation of marriage or presumptive consummation, mata' will be obligatory; and mata' will be fixed up in accordance with the custom and usage and in conformity with the husband's position but shall not exceed half of proper mahr.

Iraq

The relevant provision in Iraqi Code reads as follows:⁵⁹

"The wife is entitled to the whole of the specified mahr after the marriage is consummated or after either spouse has died. In case of divorce before consummation, half of the mahr is payable."

58. Article 55

59. Article 21

Chapter-VI STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES

Morocco

The position under Moroccan Code will be as follows:⁶⁰

A husband who, on his initiative, divorces his wife shall give her a *mata'* in accordance with his financial condition and the status of the wife. No such gift is necessary when *mahr* is specified but the wife is divorced before consummation of marriage.

13. *Mahr* as damages for breach of betrothal

In Brunei Darussalam *mahr* (locally called *mas-kahwin*) has been connected with the payment of damages for breach of promise to marry. The relevant provision of the Brunei enactment reads as follows:⁶¹

"If any person shall, either orally or in writing and either personally or through an intermediary, have entered into contract of betrothal in accordance with Muslim Law and subsequently refuses without lawful reason to marry the other party being willing to perform the same, the party in default shall be liable, if a male, to pay as damages the amount of the mas-kahwin which would have been payable together with other monies extended in good faith in preparation for the marriage or if a female to return the betrothal gifts, if any, or the value thereof and to pay as much damages as the amount of such

60. Article 60

61. Article 136, Religious Council State Khathis and Courts Enactment, 1955

Chapter-VI **STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES**

other monies as aforesaid; and the same may be recovered by action in the Court."

14. Return of *mahr*

Iraq

The Iraqi code incorporates provisions about the return of *mahr* on the failure of betrothal. It provides:

"If the man had given to the fiancée, before the marriage, any property on account of mahr, and either party failed to contract the marriage or died, what was so given shall be returned if intact; where such property has been lost possession of, its value shall be recoverable." ⁶²

Family Law of 1978, in the former state of North Yemen contains following provisions in this respect:⁶³

Engagement or promise to marry or acceptance of *mahr* or gift etc., shall not constitute marriage and either party can go out of it. Where the man cancels the engagement he can withdraw the *mahr* or its value, while if the woman has broken the engagement she must return the gifts presented to her.

62. Article 19 (2)

63. Article 2

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

15. *Mahr* and equality of spouses (Kufu)

Doctrine of Kufu, which intends that the parties to a marriage must be equal for ensuring harmonious life to the spouses after marriage, was developed by some Muslim jurists. Now also, the modern legislation in some Muslim countries has connected *mahr* with this doctrine.

Lebanon

*"... Equality in wealth means that the husband shall be capable of paying the prompt mahr (mahr al mithl) and meeting the maintenance expenses of the wife"*⁶⁴

*"Where a major girl denies that she has a guardian and marries a person, if it appears that she married an 'equal' the marriage shall be binding even if the mahr is less than her proper mahr. But if she has married a person who is not her 'equal', her guardian may approach the court and the marriage may be dissolved"*⁶⁵

Morocco

"Where the guardian neglects to contract the ward into marriage, the qazi shall ask him to do so and if he refuses to do so the qazi

64. Article 45

65. Article 47, Ibid

Chapter-VI STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

*himself can give her in marriage to a person who is her 'equal', with proper mahr.*⁶⁶

16. *Mahr* and *Khula'*

Khula' is the termination of the marriage bond on the request of the wife for some *iwaz*. It is not necessary that the *iwaz* must be the *mahr* itself. It can be any property (monetary or non-monetary) equivalent to or more or less than *mahr*. But usually the wives give up their *mahr* as *iwaz* for *khul'*. Relevant provisions are found in the enactments of Iraq and Algeria.

Iraq

Iraqi code in this respect provides:⁶⁷

"A husband can agree to khul' in consideration of an amount less or more than mahr".

Algeria

The Algerian Family Code, 1984 provides differently as follows:⁶⁸

"The wife can get separation from the husband by khul' under an agreement on the same. In case of disagreement, the qazi may

66. Article 13

67. Article 13

68. Article 54

Chapter-VI **STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES**

pass a decree of *khul'* for a consideration to be given by the wife not exceeding the value of her *mahr*."

Lebanon

Section 130 of the Ottoman Law, in effect, deprives a divorced wife of her *mahr* or makes her return not more than half of her *mahr* (if already paid), if the wife is responsible for the breakdown. It provides:

"...where no reconciliation is possible and fault is of the husband, divorce shall be granted. Where the fault is of the wife, a khul' may be granted in consideration of the whole or part of mahar..."

Syria

According to Article 98 of the Syrian Code, where consideration has been fixed for *khul'*, which is something other than *mahr*, this consideration is binding and both parties are also released from any obligation regarding *mahr* or maintenance. And as per article 99 where the parties do not name any consideration, the *khul'* shall take effect and both parties shall be released from the rights of the other regarding *mahr* and maintenance.⁶⁹ In both these situations the wife shall have to forgo her *mahr*.

69. Norman Anderson, *Law Reform in the Muslim World*, P. 136(1976)

Chapter-VI STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

17. *Mahr* and *Faskh*

In cases of *faskh* (judicial divorce) the divorced women's entitlement to *mahr* in various Muslim countries will, among other things, depend upon the provisions in their respective enactments given below.

Pakistan and Bangladesh

The Dissolution of Muslim Marriages Act, 1939 applicable both in Pakistan and Bangladesh protects the divorced woman's right to *mahr*, in following terms:⁷⁰

"Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her mahr or any part thereof on the dissolution of her marriage."

Other Countries

The position of women's *mahr* on *faskh* in other Muslim countries, is as follows:⁷¹

70. Section 5. Same provision is applicable in India also as these three countries share their legal history upto 1947. A detailed analysis of the impact of this provision on *mahr* can be found in XIII ICLR 43-45 (1993).

71. Names of the countries and the relevant provisions in their respective enactment are— Egypt 1929:18; Iraq 1959:21; Jordan 1976:48-57; Lebanon 1917:82-87; Morocco 1958:24,60; Former State of North-em Yemen 1978:33-35; Somalia 1975:27; Syria 1953:59-63.

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

- i) in all cases where *mahr* is not specified but is, otherwise, payable proper *mahr* shall be payable in all countries.
- ii) where the divorced wife claims a higher amount to have been specified as her *mahr* but cannot prove it, while the husband quotes an amount as specified *mahr* which seems unusually low, proper *mahr* shall be payable. (Egypt, Jordan, Lebanon and Syria)
- iii) where an unconsummated marriage is dissolved on the grounds of impotency or sexual deformity of either party, no *mahr* is payable. (Jordan and Syria)
- iv) where an unconsummated marriage is dissolved while *mahr* is specified, half of it will be payable. (Iraq, Jordan and Syria)
- v) where a marriage is dissolved on account of the wife's apostasy, no *mahr* will be payable. (Jordan)

One more situation envisaged by the Ottoman. Law is the marriage during death-illness. About the right to *mahr* in such cases, it provides:⁷²

If a person marries during his death illness and it appears that the specified *mahr* in such a marriage is equal to the proper *mahr* of the wife, she will get it from the property left by the husband; but if the *mahr* so specified exceeds the amount of the proper *mahr*, the excess shall be governed by the law of bequests.

72. Article

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

The law about *faskh* and *mahr*, in Libya is as given below:⁷³

"If the husband has claimed separation and his allegation is proved, the court shall ask him to pronounce a divorce, and if he refuses to do so the court shall decree a divorce. In either case the court shall order the lapse of deferred *mahr*, maintenance of *iddat* and accumulated past maintenance. If the allegation has not been proved, the court shall dismiss the suit.

The Syrian enactment, in its article 54 grants better protection to the women about *mahr*. The relevant clauses (iii) and (iv) read as follows:

"mahr shall be treated as a preferential debt...."

"Every mahr debt stipulated in the deed of marriage or divorce shall regarded as a secured debt... Deferred mahr shall be payable before the expiry of iddat."

18. Procedure for payment of *mahr*

In Malaysia procedure has been laid down about the payment of *mahr* (locally called *mas-kahwin*) and also about making customary payments in addition to *mahr*, called *pemberian*. The said procedure is as follows:⁷⁴

73. Article 11 (iv) Law on Women's Rights in Marriage and Divorce, 1972

74. Section 21, Islamic Family Law (Federal Territory) Act, 1984 (Malaysia)

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

- (1) The *mas-kahwin* shall ordinarily be paid by the man or his representative to the woman or her representative in the presence of the person solemnizing the marriage and at least two other witnesses.
- (2) The registrar shall, in respect of every marriage to be registered by him, ascertain and record:
 - (a) the value and other particulars of the *mas-kahwin*.
 - (b) the value and other particulars of any *pemberian*;
 - (c) the value and other particulars of any part of *mas-kahwin* or *pemberian* or both that was promised but not paid at the time of the solemnization of the marriage and the promised date of payment; and
 - (d) the particulars of any security given for the payment of any *mas-kahwin* or *pemberian*.

Syria

The Syrian Code also contains a procedural provision as follows:⁷⁵

Mahr is wife's right and the husband shall not be absolved of his liability except by its payment to her personally if she has full legal capacity – unless the contract of marriage names a particular representative to take possession.

75. Article 6

Chapter-VI **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES**

The law of set-off shall not apply to prompt mahr even if permitted by the wife."

19. *Mahr* and anti-dowry legislations

Dowry is confused by some with *mahr* because of its being rendered into English as dower. The anti-dowry legislations in Bangladesh and Pakistan make this distinction clear and protect *mahr* from any impact thereof.

Pakistan

In Pakistan, the Dowry and Bridal Gifts (Restriction) Act, 1976 while defining bridal gift, excludes *mahr* from its purview as follows:⁷⁶

"Bridal gift means any property given as a gift before, at or after the marriage, either directly or indirectly, by the bridegroom or his parents to the bride in connection with the marriage but does not include *mahr*".

Bangladesh

In Bangladesh also, the Dowry Prohibition Act, 1980 excludes *mahr* from its application. While defining dowry it provides:⁷⁷

"Dowry means any property or valuable security given or agreed to be given either directly or indirectly;

76. Section 2 (a)

77. Section 2

Chapter-VI STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

- a) by one party to a marriage to the other party to the marriage; or
- b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person, at the time of marriage or at any time or before or after the marriage as a consideration for the marriage of the said parties, but does not include dower or *mahr* in case of persons to whom the Muslim Personal Law (Shariat) applies.

The law on *mahr* is thus protected by these legislations in these countries.

On the basis of minute scrutiny of different legislative measures enacted by various Islamic countries it may be concluded that the legislation about *mahr* that has taken place in many Muslim countries is an embodiment of the established principles of Shariah. There are many good points in it which deserve for appreciation. The definition of *mahr* given by the Moroccan enactment is clear and true to its spirit. This effort is more admirable than that of many traditional authors, text-book writers and judges. The statutory recognition of the bride's consent as an essential requirement for fixation of *mahr* coupled with the express declaration of *mahr* as exclusive property of the wife is a

Chapter-VI STATUTORY POSITION OF *MAHR* IN DIFFERENT ISLAMIC COUNTRIES

welcome step taken by some Muslim countries towards ensuring 'Islamic gender-justice.' Encouraging is the effort of certain countries to evolve principles about the settlement of disputes related to the quantum of *mahr* and its enforcement, though to attain certainty in this respect, some further attempt is needed. The laying down of procedures for payment of *mahr*, its increase or decrease and maintenance of records, is an appropriate legislative action which can after further improvements, streamline the working of the institution of *mahr* in Muslim society. Moreover, the statutes which connect *mahr* with damages for breach of betrothal are a good addition to family penal laws. These merits aside, the legislative prescription of a ridiculous upper ceiling of *mahr* in Somalia and the former state of South Yemen is a deviation from the established norms of Shariah. Such deviations, substantially affecting the rights of woman, need to be avoided. The 'widow's right of retention', an important aspect of the law of *mahr* has not yet been brought under legislation irrespective of the fact that there has been a lot of controversy on the issue whether such right is heritable or transferable and can be claimed by a Muslim divorcee or not.

Chapter-VI* **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES*

The Holy Quran and Hadith describe Islam as the only eternal and universal order, envisaging the fundamental Principles of law and justice mixed with obligatory formulations. These principles of Quran and Hadith are universal, multi-dimensional and eternal which are claimed to be suited to all future times. In view of the continuity of creation by Almighty Allah a continuous process of law identification and deduction with an absolute nexus with the revealed principles is needed in view of the continuity of creation of the lands of Almighty Allah. The process of law identification and deduction under Islam must be differentiated from the modern law making because such a noble job can only be discharged by the Mujtahibs who are generally not available in non-Islamic countries. Basically the purpose is to bridge the gaps of time and space in the Islamic judicial system.

Adopting the practical approach it may be deduced that these plethora of juristic formulations and precedents available in Fiqh (Islamic Juris Corpus) which offer enough choice to adopt suitable norms after a proper apprehension of changing situations. Therefore jurists are supposed to take a serious note of the existing circumstances and provide a better choice of suitable regulations about various

Chapter-VI* **STATUTORY POSITION OF MAHR IN DIFFERENT ISLAMIC COUNTRIES*

matters from the same body of Fiqh. Needless to emphasize that onerous task of law identification and deduction may not be given in the hands of modern state legislatures but this task can be discharged by the qualified Muslim scholars under a common umbrella. The said process is not an ordinary process of reformation but purely is an Islamic process characterized by Obedience to Allah, Investigation and elective choice of suitability from the prescribed and approved rules of Shariah.

CONCLUSION & SUGGESTIONS

CONCLUSION AND SUGGESTIONS

To conclude any study and more so a research work is difficult and a cumbersome task. I am reminded of the immortal words of the famous Greek Philosopher Socrates who said, "*I know nothing except the fact of my ignorance.*" My ignorance may be noticed everywhere in this study but it may be more prominently visible in this part of the work.

Mahr is not a mere Pre-Islamic or non-Islamic concept adopted by Islam but is a divinely ordained Islamic institution with express direction in the Quran and manifest instructions from the practices of the Prophet (P.B.U.H.). This institution has survived throughout the Muslim history as a living institution having attracted the attention of jurists in all times, who have always referred only to the rules and regulations related to the institution of *Mahr* with no reference to its philosophy and purpose, which is a tragic part of the matter. No serious study has been made about the exploration of the real meaning of *Mahr* and its utility.

The dower amount, which was generally paid or taken by the father of the bride, was prohibited by Islam and it was commanded by Almighty Allah that the right of dower is not the right of the father of the bride but it

CONCLUSION AND SUGGESTIONS

should be paid to the wife and not her father or other relatives. It is ordained in the Holy Book that:¹

"Ye are one from mother wed them with the leaves of their owners and give them their dowers according to what is reasonable."

Prophet Mohammad (P.B.U.H.) also declared that the best "among you are those who are kindest of their wives."

"There can be no marriage without dower."

Hazrat Ali

In this way, we see that dower plays an important role in the marital relationship of the husband and wife. It is a coordinal right of Muslim wife guaranteed by Quran and Prophet Mohammad (P.B.U.H.).

This dower amounts have invited some controversy about its nature. Some jurists and judges are of the view that it is a consideration of the marriage, Justice Mahmood is of the view that "dower under Islamic law is a consideration for the sexual intercourse by way of the analogy of contract of sale. And her surrender of her person to her husband resembles the delivery of goods to the vendors." ²

1. Al-Quran IV:XXVS.

2. *Abdul Qadir Vs. Saleema*, ILR (1886) 8 All 149.s

CONCLUSION AND SUGGESTIONS

The Calcutta High Court also supported the views of Justice Mahmood. But many others who do not subscribe to the view that dower is a consideration of marriage held it as a token of respect.³ Sir Abdur Rahim has remarked:

*"that dower is not a consideration proceeding from the husband for the contract of marriage, but it is an obligation imposed by the Muslim law as a mark of respect for the wife."*⁴

Sir Sulaiman in *Anis Begum Vs. Mohd. Istifa*⁵ said that "it is quite obvious that the analogy or sale cannot be carried too far. The Muslim marriage cannot be regarded as purely a sale of the person of the wife in consideration of the payment of dower."

The Lahore High Court in *Mt. Fatima Bibi Vs. Lal Din*⁶ and further Allahabad High Court in *Smt. Nasara Begum Vs. Rizwan Ali*⁷ had observed that dower under Mohammedan Law is not a consideration as it is understood under the Indian contract Act. But dower is an obligation imposed on the husband as a mark of respect of the wife.

3. *Subrunnisa Vs. Subdu Sheikh*, AIR (1934) Cal. 693.

4. Sir Abdur Rahim, *Principles of Mohammedan Law Jurisprudence*, 334 (1958)

5. ILR (1934) All 743.

6. (1937) Lah. 345.

7. AIR (1980) All 119

CONCLUSION AND SUGGESTIONS

On the other hand some jurists regards dower as a necessary incident of marriage. That is to say that if at the time of marriage the dower is not fixed the husband is bound to pay proper dower to his wife. Tahir Mahmood says "that *Mahr* is an amount settled on the wife by the husband as an essential component of Muslim Marriage. Even if no sum is mentioned in marriage the wife is nevertheless entitled to the proper dower." ⁸

Fatawa Qazi Khan⁹ also declares that "if no dower is fixed at the time of marriage the law will presume it by contract itself."

But the actual position is that dower is a token of respect of the wife as well as necessary incident of marriage.

On the basis of nature of dower, it was defined in different ways by different jurist. Mulla while defining the dower says that dower is an amount or property which the wife is entitled from her husband in consideration of marriage." ¹⁰

-
8. D. Tahir Mahmood, *Muslim Law of India*, 71 (1980)
 9. *Fatwa Kazi Khan*, p. 428
 10. Mulla: *Principle of Mohammadan Law*, 308 (1979)

CONCLUSION AND SUGGESTIONS

But the most appropriate definition of dower has been given by Sir Abdur Rahim that "it is either a sum of money or other form of property to which the wife becomes entitled by marriage. It is an obligation imposed by the law on the husband as a mark of respect of the wife."¹¹

Like the nature of dower various observations have been made about the object of dower in Islam, some say that the real object of dower in Islam is that it is a provision for the wife for her rainy days. Others who do not follow the first view say that it will serve a check on the husband to divorce his wife. And the husband will think twice before pronouncing talaq. Some say that the real object of dower is financial gain to the wife. But it is not correct. Because if financial gain was the main object of dower then why Prophet Mohammad (P.B.U.H.) approved the marriage as only an iron ring as dower amount. The real object of dower was only to recognize the status of the wife, who was treated as a saleable item in the pre-Islamic Arabia.

11. Abdur Rahim: *Mohammadan Jurisprudence*, 8 (1958)

CONCLUSION AND SUGGESTIONS

As it is clear that in marriage dower is being given by the husband to the wife, the nature of which is defined by various jurists in different ways. It is not necessary that the payment of whole dower is compulsory on the husband at the time of solemnization of marriage. The jurists concerned have divided the dower in two categories. The dower the payment of which is necessary at the time of marriage or before the sexual intercourse is called as prompt dower. And the wife is entitled to claim the amount of her prompt dower before the cohabitation. The wife may also refuse to go on journey with her husband until she receives the full amount of her prompt dower.

The other dower, the payment of which is not necessary at the time of marriage and it is generally paid after death or divorce is called as deferred dower the wife is not entitle to ask the payment of deferred dower. But if the husband wishes to pay it, before the divorce then he can do it very well. As the payment of deferred dower becomes due, only on the happening of two contingency that is death or divorce. The deferred dower cannot be claimed by the wife on the happening of the insolvent of

CONCLUSION AND SUGGESTIONS

her husband. In *Sughra Bibi Vs. Gaya Prasad*¹², the Allahabad High Court has categorically held that the death or divorce is the only contingency on the happening of which the wife can claim the amount of her deferred dower.

If the wife embraces another religion say Christianity then also she can claim the amount of her deferred dower. Because after the renouncing of her faith the marriage is dissolved. And the husband cannot claim that she is not entitled for her deferred dower because a marriage of a Muslim with a Kitabia is a valid one.

There is a conflict of opinion among the jurists that whether the wife can refuse to live with her husband after surrender of her person on the ground of non-payment of her prompt dower. Imam Abu Hanifa is of the view that the wife can refuse to live with her husband for non-payment of prompt dower and it does not matter whether sexual relation has taken place between them or not. On the contrary, his two disciples Imam Yusuf and Imam Mohammad held the opinion that she cannot do so if once she has surrendered her person to her husband.

12. (1930) All L.H. 1038.

CONCLUSION AND SUGGESTIONS

The present study in its critical analysis in respect of the issue as to what is the exact nature of the liability of the husband to pay the amount of prompt dower reveals that the wife may refuse her husband in his suit for restitution of conjugal right to come with him on the ground of non payment of prompt dower. This view is attributed to the great Imam Hanifa, which has been recognized by the consensus of the classical as well as modern jurist of Muslim law. And the same has been followed by the Allahabad High Court in *Anis Begum Vs. Mohd. Istafa*¹³ where it was impliedly adopted by imposing a condition on passing a decree for restitution to pay of prompt dower first.

Justice Sulaiman also rejected the contract of sale of goods to the contract of marriage applied by Justice Mahmood in *Abdul Qadir Vs. Saleema*.¹⁴ Right of seller to stoppage of goods in transit can by no stretch be imagination be compared with the wife's right to refuse to cohabit with her husband if the dower is not paid. Consummation of marriage cannot be compared with the delivery or transfer of possession of goods to the purchaser, like goods, wife cannot be a subject of sale.

13. AL (1934) All 743

14. ILR (1886) 8 All 149.

CONCLUSION AND SUGGESTIONS

In interpreting the Hanafi law, sometimes in view of Abu Hanifa has been preferred in favour of the wife in every respect by the court. And some time on certain occasions the courts followed the more progressive disciples of the same school, on preference to his founder by allowing the right of restitution in favour of the husband if marriage has been consummated, even if prompt dower is not paid.

The courts in India have sometimes interpreted the principle of Muslim law in progressive spirit. No doubt a realistic approach to the legal history of Islam has never remained outside the purview of judicial interpretation deviating from the traditional principle of Muslim Law. The jurists can interpret the Muslim law in a liberal way but without claiming the right of Mujtahid.

Basically *Mahr* serves as a keystone of the arch on which a Muslim home rests. *Mahr* is not a coercive measure but a civilized way of winning and reposing trust reciprocally with a friendly gesture like presenting a gift to the other with open heart and smile. The basis of the institution of *Mahr* lies in the Quran and Hadith, but while legislating and decision making on the subject reference has not always been made to these basic

CONCLUSION AND SUGGESTIONS

sources of Islamic law. Even the Quranic Terminology has been ignored which has let the doors open for many misconceptions. The Quran uses the term Sadaqah, ajr and fariezah for *Mahr*. It has been wrongly rendered into English as 'dower' which in reality was only an endowment due to widows at equity in common law countries. *Mahr* is different from Roman donatio propter nuptias, French dot, Hindu Stridhan and practices like bride-price and dowry. In Islam *Mahr* is not an essential of the contract of marriage but an effect of the nikah. It is legally enforceable because its non-payment will mean the breach of a positive direction of the Quran and it affects the honour and interest of its object (The woman).¹⁵

Generally the quantum of *Mahr* is being fixed according to socio-economic conditions of the parties and the people of place. Hanafis prescribe a minimum of Ten dirham and Malikis accepted even a smaller amount probably because they inhabited in poorer area. Where no *Mahr* is fixed by the parties the wife is entitled to proper *Mahr* to be assessed with reference to the qualities of the wife and economic status of her paternal family. Some Shias hold the view that in such cases the amount of *Mahr* should not exceed *Mahr-al-sunnat* (500 dirhams). This rule does not seem

15. Dr. M. Afzalwani, *The Islamic Institution of Mahr*, at p. 246.

CONCLUSION AND SUGGESTIONS

to be sound in justice. Upper ceiling of *Mahr* has also been fixed by statutes in Somalia and Yemen at \$1000 and 100 dinars respectively. This is also not in conformity with Shariah.

The wife has a power to remit whole or a part of *Mahr* whenever she may like to do so. But under Shariah no incidence is available where *Mahr* can be reduced by any authority without the free consent of the wife. The Quran and Hadith in general imply a quick discharge of *Mahr*. It may remain unpaid only in exceptional situations. The practice in Muslim society, however has been different. Usually a portion of *Mahr* termed as prompt *Mahr* is being made payable immediately on marriage or on demand. Another portion called deferred *Mahr* is said to become payable on the happening of some specified event (death or divorce). The breaking of *Mahr* into two parts has become an established practice and rules are formed in the books of fiqh about the realization of these types of *Mahr* with ancillary details.

Consummation confirms the *Mahr* in full. Hanafis, Malikis and Hambalis consider "valid retirement" as equal to actual consummation where the marriage is valid and not irregular. Shafis and Ithna Asharis

CONCLUSION AND SUGGESTIONS

differ from other schools in this respect. They do not equate "valid retirement" with actual consummation in any case. In case of a batil marriage no *Mahr* is due to the wife because it is no marriage. However, if marriage has been consummated the wife will get the *Mahr* amount. In case of consummated irregular marriage *Mahr* is payable to the wife provided it was contracted in ignorance of the bar to such marriage. She will get specified *Mahr* or proper *Mahr*, whichever is less.

The claim of *Mahr* survives the death of both or either of the spouses. This is immaterial whether the *Mahr* was ascertained or unascertained. For widows a special right is found in Muslim law called the right of retention. To retain the possession of her deceased husband's property of which she has obtained peaceful possession till her *Mahr* is satisfied, however she is bound to render accounts of property under her possession.

Divorced women's claim to *Mahr* depends upon the *Mahr* of marriage dissolution. On the dissolution of a consummated marriage, the whole *Mahr* becomes payable to the wife. The position in cases of unconsummated marriage is not uniform. Generally no *Mahr* is payable to

CONCLUSION AND SUGGESTIONS

the wife if an unconsummated marriage is dissolved by the act of the wife. When an unconsummated marriage is dissolved after the fixation of *Mahr*, only half of the *Mahr* is due to the wife. If *Mahr* has not been fixed before dissolution no *Mahr* but *mata* is to be paid to the wife. At some places like Brunei *Mahr* is being taken by woman as damages for breaking betrothal.

Mahr is not an amount payable on divorce and is not substitute measure for maintenance of divorcees. The impression created by the Supreme Court of India in Bai Tahira is we submit not correct. *Mahr* is payable on marriage as a token of respect and symbol of the rights of women in Islam, especially property rights. Islam has its own separate comprehensive system for maintenance of all the individuals in a family and society at large. No court or legislature is supposed to belittle the significance of *Mahr* and treat it merely a substitute for maintenance. Some people confuse *Mahr* with *mata* which is a gift due to the wife on divorce. This is a Quranic concept in true tune with its directive "either be with them with kindness or separate from them with merey." The differentiation between the two cannot be ignored.

CONCLUSION AND SUGGESTIONS

Suggestions:

The practice of *Mahr* among Muslims, as is revealed by the present study, is not conscious, enthusiastic and honest to the level of expectation. Its significance is not well understood by them. Such a negligent approach towards *Mahr* and other aspects of Islamic law leads to the unpleasant happenings and injustice by way of deprivation. This is basically due to ignorance of Muslims in general and women in particular about the Divine character, moral significance, social purpose and legal necessity of *Mahr* and its sister institutions, *nafaqah* and *mata'*. Therefore, there is a need for mass education about the principles of Islamic law. Women in particular, are to be educated about the actual concept and working of the institution of *Mahr* and the related laws.

Besides proper education policy, following measures may be adopted to make the working of the institution of *Mahr* more effective and just.

1. Muslim community be sensitized about the concept of *Mahr* and its utility and relevance in present era by Qazi and jurist of Islamic law.

CONCLUSION AND SUGGESTIONS

2. The decision-making in personal law matters must take place squarely under the principles of Islamic law and only fair use of analogies must be allowed.
3. Deviations in the present practices and precedent from the spirit of the institution of *Mahr* must be sufficiently taken note of.
4. The printed nikahnamas available in the market and in common use nowadays need to be thoroughly revised and standardized with careful scientific modulation.
5. *Mahr* as a necessary effect of Muslim marriage must be well distinguished from customary payments like ornaments, and valuables given to the wife at the time of solemnization of marriage.
6. *Mahr* must be actually handed over to the wife as and when demanded so that it can be used by her for economic development.
7. Reasonable amount of *Mahr* be fixed with the free consent of both the parties. Bride's consent as is usually not being sought, must be obtained after due deliberations with her.
8. *Mahr* must be considered as a symbol of honour and not as a mere economic benefit to the wife or a coercive measure for preventing talaq which become a cause for excessive fixation of *Mahr*. The experience has shown that the exorbitant *Mahr* has never served the purpose for which it was fixed, instead, has dragged the parties to the litigation with no or little gains.
9. Usually higher *Mahr* is being fixed in the cases where parties to the marriage lack mutual trust and confidence and are in a state of doubt and suspicion. To avoid such a situation, the doctrine of kufu,

CONCLUSION AND SUGGESTIONS

with special emphasis on moral attitude, ethical consciousness, social behaviour and intellectual attainments of the parties to the marriage, must be followed.

10. Generally the payment of *Mahr* must be prompt as is demanded by its nature. It's payment may be deferred only when demanded by exceptional circumstances and expressible reasons.
11. Where no separate mention of prompt and deferred *Mahr* has been made, whole of the *Mahr* must be deemed to be payable on demand.
12. Regarding refusal of conjugal rights for non-payment of prompt *Mahr* the Imam Abu Hanifa's view must be followed and the decision of Allahabad High Court in Abdul Kadir (1886) be overruled. The wife must be given a right to refuse society to the husband for non-payment of prompt *Mahr* even if consummation of marriage has taken place.
13. So far as the disputes about relinquishment of *Mahr* are concerned the futwa of Hazrat Umar(R.A.) must be adopted. If the lady, after the relinquishment of her *Mahr* claims it again she must be paid that because to demand it again means that she had not rendered it willingly. However, it may be pointed out that if the wife does not claim it again during her life time her heirs be not given such right.
14. Where a girl contracts her marriage for inadequate *Mahr*, proper *Mahr* be made payable to her on consummation of marriage. If she really intends to agree to a lower *Mahr*, she can remit a part of it later after marriage. Same principle may be followed where a Shia grandfather has exercised his power of abatement of *Mahr*.

CONCLUSION AND SUGGESTIONS

15. For the purposes of "widow's right of retention", the term possession must be given a liberal interpretation and a widow, if living with her husband till his death, be deemed to be in possession of a reasonable portion of his-house property even after his death.
16. The "widow's right of retention" must be treated as heritable. There is no harm in holding it also as transferable though the doctrine of Shufa needs to be adhered to in this case strictly.
17. Where dissolution of marriage takes place before its consummation half of the *Mahr* (where *Mahr* was fixed) or only *mata* (where *Mahr* was unspecified) is due to the divorcee. In some cases, it has been observed that the marriage breakdown takes place immediately after some days of marriage. In such cases, the woman to save her image of virginity, does not claim that the marriage has got consummated when it has actually so happened. She, therefore, loses her right to *Mahr*, just to save her particular image for obvious reasons. In view of this fact, it is suggested that whenever the wife resides in the matrimonial home (where husband also resides) for a reasonable period of time, full *Mahr* must be made payable to the wife. In other words, the concept of *khilwat-i-sahihah* must be given an extended meaning. However, the dissolution of marriage should not have taken place on account of the impotency of the wife. In such cases the women should not claim *Mahr*. But if the husband has sufficient means he must offer full *Mahr*.
18. In fact, the practice prevailing amongst the illiterate and semi-literate muslim society is that men generally use to take the plea that

CONCLUSION AND SUGGESTIONS

their wives have relinquished their claim of dower before consummation of marriage. This is against the spirit of Islam as well as against the law of the land.

19. In case of dissolution of marriage, the wife must file a suit, if dower claim remains unsatisfied for one time economic transaction, which will include the amount of *Mahr* and the provision relating to maintenance upto iddat period.
20. In the present era of globalization and liberalization of the world's economy, the Muslim women should also realize the importance of *Mahr*. Therefore, the quantum of *Mahr* should be fixed with their due consent at the time of solemnization of marriage.
21. In the course of the instant study from the authentic sources, it has been noticed/observed that in majority of the Muslim marriages, dower is either prompt or deferred and partly prompt and partly deferred. Therefore it is suggested that while fixing the amount of dower, the criteria taken into consideration for specifying unspecified dower (*Mahr-ul-misl*) should be given due weightage. So that it may go a long way to afford economic security to the *Mahr* consequent upon her marriage effectively.

BIBLIOGRAPHY

Tafasir (Exegetical Commentaries on al-Quran)

- ❖ Al-Alusi Baghdadadi, Abi-al-Fazl Shahabuddin al-Syed Mahmood (d. 127 AH) *Tafsir Rooh al Ma'ani* (Maktabai Imadadiya Multan, n.d.)
- ❖ Ali, Abdullah Yusuf, *The Holy Quran: Text, Translation and Commentary* (Qatar, 1946): Amana Corp. USA, 1983)
- ❖ Ibn-Khatir, Imam Hafiz Abul Fida Imam al-Din bin Ismail bin Umar (d. 774), *Tafsir Ibn Kathir*, (Masood Publishing House, Deoband, n.d.)
- ❖ Maududi, Maulana Syed Abul A'la (d. 1979) *Tafhim al-Quran*, (Markazi Maktabah Islami Delhi, 1987) 24th Ed.
- ❖ Thanwi, Maulana Ashraf Ali, *Bayan al-Quran*, (Taj Company, Delhi, 1991) Reprint

Lughat al-Quran

- ❖ Al-Isfahani, Sheikh Abi al-Qasim al-Hussain bin Muhammad Ibn al-Faz'l al Ragib, *Mufradat al-Quran, The Obscure words of the Quran* (Egypt, n.d.)
- ❖ Fazl, Mirza Abul, *Gharib al-Quran Fi Lugat al-Furqan*, (Allahabad, 1925)
- ❖ Jalali, Maulana Syed Abdul Rahim, *Lugat al-Quran* (Delhi, 1376 AH/1957 AD)
- ❖ Meeruti, Qazi Zain al-Abidin Sajjad, *Qamus al-Quran*, (Meerut, 1381 AH/1962 AD)
- ❖ Nau'mani, Maulana Abdul Rashid, *Lugat al-Quran* (Delhi, 1378 AH/1958 AD)

Other Lughat

- ❖ Al-Misri, Abi Faz'l Jamaluddin Muhammad bin Mukarram Ibn Manzoor, *Lisan al-Arabi* (Beirut, 1374 AH/1955 AD)
- ❖ Feroze al-Din Maulvi, *Feroze-al-Lugat* (Delhi, n.d.)
- ❖ Johnson Francis, *Dictionary of Persian, Arabic and English* (W.H. Allen & Co., Leadenhall Street, London, 1852)

Works on Ahadith

- ❖ Al-Asqalani, Ibn Hajar, *Fatah al-Bari* (A commentary on Sahih Bukhari, Cairo, 1325 A.H.)
- ❖ Al-Azwi Sajastani, Abu Dawud Sulaiman bin Ashas bin Ishaq bin Bashr bin Shadad bin Umar bin Imam (202 AH- 275 AH) *Sunan Abu Dawud* (Kanpur, 1346 AH) English Translation by Prof Ahmad Hasan (Delhi 1985)
- ❖ Al Baiyhaqi Abu Bakr Ahmad Bin al-Husain: *Al-Sunan al-Kubra* (Hyderabad) 1353 A.H.
- ❖ Al-Bukhari Imam Abu Abdullah Mohammad bin Ismail bin Ibrahim bin Mughairah (194 AH-256 AH) *Kitab al-Jai al Sahih* (Sahih al-Bukhari) English version by Dr. Muhammad Muhsin Khan (Kitab Bhavan, New Delhi, 1987 A.D.)
- ❖ Al-Khatib al-Umri, Imam Wali al-Din Muhammad bin Abdullah (d. 743) *Mishkat al-Masabih* (Delhi, 1350 AH) English version by Robson, J.M. (Lahore, 1975)
- ❖ Abu-Hanifa, Imam Aizam, Mussand Imam Aizam: Maulana Khurhid Alam edition, (Deoband, 1967)
- ❖ Al-Tirmizi, Imam Abu Isa Muhammad bin Isa bin Sorah (209 AH-279 AH) *Jami Tirmizi* (Kanpur, n.d.)
- ❖ Malik, Imam (713 AD to 795 AD; 93 AH to 179 AH) *Al-Mawatta*, (Cairo, 1951) English version by Prof. Muhammad Rahimuddin (Kitab Bhavan, Delhi, 1981)

Encyclopaedia

- ❖ Encyclopaedia Britannia (William Benton Publisher, 1970)
- ❖ Encyclopaedia of Islam (Leiden London, 1978-1991)
- ❖ Encyclopaedia of Islam (Urdu) (Punjab University, Lahore, 1407/1987)
- ❖ Encyclopaedia of Seerat (Seerat Foundation, London)

Other Works

- ❖ Ajjola, A.D. Alhaj, *Introduction to Islamic Law*, (Adam Publishers, Delhi, 1969)
- ❖ Ali, Syed Ameer, *Mahommedan Law*, (Kitab Bhavan, Delhi, 1985)
- ❖ Anderson, Norman, *Law Reform in Muslim World*, (London, 1976)
- ❖ Baillie, Neil, B.E. *Digest of Mohummadan Law* (Two volumes) Lahore, 1865.
- ❖ Fyzee, Asaf Asghar Ali, *Outlines of Mohammedan Law*, (Oxford, 1974) 4th Ed.
- ❖ Fyzee, Asaf Asghar Ali, *Compendium of Fatimid Law*, (Simla, 1969)
- ❖ Khadduri, Majid and Liebesny, Herbert J., *Law in the Middle East*, (Washington D.C., 1955)
- ❖ Mulla, *Commentary on Mohammedan Law*
- ❖ Mahmood, Tahir, *Family Law Reform in Muslim World*, (Bombay, 1972)
- ❖ Mahmood, Tahir, *The Muslim Law of India*, (Allahabad, 1980)
- ❖ Mahmood, Tahir, *Personal Law in Islamic Countries*, (New Delhi, 1987)
- ❖ Mahmood, Tahir, *Muslim Personal Law* (Nagpur, 1983)
- ❖ Mahmood Ullah Ibn. S. Jung Alhaj, *The Muslim Law of Marriage*, (Delhi, 1986)
- ❖ Mulla, *Principles of Mohammedan Law*, 20th Edition (2013)
- ❖ M. Afzal Wani, *Islamic Institution of Mahr*, 1st Edition (1996)
- ❖ Pearl, David, *A test book on Muslim Personal Law* (New Hampshire, USA 1987) 2nd ed.
- ❖ Rahim Abdur, *Mohammedan Jurisprudence* (Madras, 1911)
- ❖ Rumsey, Almaric, *Mohammedan Law of Inheritance* (Lahore, n.d.)
- ❖ Schacht, Joseph, *An Introduction to Islamic Law* (Hong Kong, 1982)

- ❖ Smith, W. Robert, *Kinship and Marriage in Early Arabia*: Stanley . Cook's edition (London, 1903)
- ❖ Tyabji, Faiz Badruddin, *Muslim Law* (Bombay, 1968)

Works on Customs

- ❖ Dogra, Sant Ram, *Code of Tribal Customs of Kashmir*, (Jammu, 1930)
- ❖ Ganjoo, N.K., *Customary Law of Kashmir* (Srinagar, 1943)
- ❖ Hamadani, A.S., *Makhzani-i-Intiqalat Haqiyat* (1965)

Articles

- ❖ Carrol, Lucy: "Divorcees Mahr and Muslim Women's Right to Maintenance", 27 JILI 487-495 (1986)
- ❖ Hussain, S.T. "Rejoinders to Danial Latifi", 80 IX Islamic CLQ (1989)
- ❖ Ibrahim Ahmad: "Ancillary Orders on Divorce in the Shariah Courts of Malaysia", 185-195 (Islamic CLQ [1987])
- ❖ Khatana, R.P., "Marriage and Kinship Among the Gujar Bakerwals of Jammu and Kashmir", in I. Ahmad (ed.) *Family, Kinship and Marriage Among Muslims of India*, 83-126 (Delhi, 1976)
- ❖ Latifi, Danial: (Comments on) Shah Bano Case 385-400 ASIL 1985.
- ❖ Mahmood, Tahir: "Application of Muslim Personal Law in the State of Jammu and Kashmir: Perspective and Prospects", 273-281, Islamic CLQ (1981)
- ❖ Mahmood, Tahir: "The Somalian Experiment with Family Law Rform", 250-266 II Islamic CLQ (1982)
- ❖ Mahmood, Tahir "The Muslim Women (Protection of Rights on Divorce) Act, 1986- Perspectives and Prospects". 159-179 Islamic CLQ (1986)
- ❖ Saksena, K.P. "Need for a Code of Muslim Law", in Tahir Mahmood (ed.) *Islamic Law in Modern India*, 133-137 (Bombay, 1972)
- ❖ Tyabji, Kamila: "Polygamy, Unilateral Divorce and Mahr in Muslim Law as Administered in India", in Tahir Mahmood (ed.), *Islamic Law in Modern India*, 139-145 (Bombay, 1972)

Table of Statutes

Foreign

- Afghanistan, Marriage Law, 1971
- Algeria, Family Code, 1984
- Bangladesh, Child Marriage Restraint (Amendment) Ordinance, 1984
- Egypt, Law on Personal Status, 1929
- Egypt, Jihan Law, 1979
- Iraq, Code of Personal Status, 1959
- Jordan, Code of Personal Status, 1976
- Jordan, Code of Personal Status (Amendment) Law, 1977
- Jordan, Law on Family Rights, 1951
- Kuwait Constitution, 1962
- Lebanon, Law on Family Rights, 1917-62
- Lebanon, Shariah Courts Organisation Law, 1942
- Libya, Decree on Codification of Personal Law, 1971
- Libya, Decree on Shariah Codification, 1971
- Libya, Law on Women's Rights on Marriage and Divorce, 1972-73
- Malaysia, Islamic Family Law (Federal Territory) Act, 1984
- Morocco, Code of Personal Status, 1958
- Ottoman Law of Family Rights, 1917
- Pakistan, Muslim Family Laws Ordinance, 1961
- Somalia, Family Code, 1975
- Sudan, Law on Marriage and Guardianship, 1960
- Sudan, Law on Talaq, Marital Disputes and Gifts Act, 1935

BIBLIOGRAPHY

- Sudan, Shariah Courts (Organisation and Procedure) Regulation 1915
- Syria, Code of Personal Status, 1953-75
- Tunisia, Uniform Code of Personal Status, 1956-1981
- Turkey, Law on Family Rights, 1917
- Turkey, Majallah, 1876
- Turkish Civil Code, 1876
- Yemen (N) Family Law, 1978
- Yemen (S), Constitution, 1970
- Yemen (S), Family Law, 1974

Indian

- Civil Procedure Code, 1908
- Code of Civil Procedure (Amended) Act, 1976
- Criminal Procedure Code, 1973
- Dissolution of Muslim Marriages Act, 1939
- Dowry Prohibition Act, 1961
- Evidence Act, 1872
- Limitation Act, 1963
- Muslim Personal Law (Shariat) Application Act, 1937
- Muslim Women (Protection of Rights on Divorce) Act, 1986
- Transfer of Property Act, 1872

Local

- Oudh Laws, Act, 1876

આચારાલય અથવા મુલ્ય આધારક નિર્ધારક આચારાલય ૪૦-૭ આગામી ।

विपक्षी अजमत अली ने प्रार्थिया को सेवरु गवाहान दिनांक 27.8.08 को लिखित रूप से आगरा आकर तलाक दे दिया ।

विपक्षी व प्रार्थिया के मध्य दिनांक 27.8.08 से आज तक किसी प्रकार का कोई आर्थिक सम्बन्ध नहीं रहा है और ना ही पक्षकारान के मध्य कोई दुरभि सन्धि नहीं है ।

पक्षकारान का निकाह 12.1.2007 को आगरा में सम्पन्न हुआ था जो कि इस न्यायालय के क्षेत्राधिकार के अन्तर्गत आता है जिसका सुनने व निर्णीत करने का पूर्ण अधिकार प्राप्त है ।

प्रार्थिया व विपक्षी के मध्य उक्त वाद के अलावा अन्य कोई वादभारत वर्ष के किसी न्यायालय में विचाराधीन नहीं है ।

प्रार्थिया सलमा बेगम के पिता रोडवेज में ड्राइवर के पद पर कार्यरत थे और अब वह सेवा निवृत्त हो गये है और उनके और भी बच्चे हैं इस कारण से वह समला बेगम का भरण करने में पूर्ण रूप से असमर्थ है ।

विपक्षी अजमत अली ने प्रार्थिया का मेहर का रूपया 11000 /-रु0 व इददत का रूपया 10000/- व उपरोक्त दिया गया सामान कीमत 2,50,000/-रु0 व नकदी 62000/- का भुगतान आज तक नहीं किया है और ना ही वापिस किया है जिसकी सूची प्रार्थना पत्र के साथ संलग्न 1 लगायत 50 के रूप में संलग्न है ।

कोर्ट फीस के रूप में न्यायालय में कोर्ट फीस अदा कर दिया गया है ।

विपक्षी को नोटिस भेजा गया परन्तु वह न्यायालय में उपस्थित नहीं आया उसके बाद दिनांक 31.1.12 को विपक्षी के विरुद्ध नोटिस की तामील पर्याप्त मानते हुये विपक्षी के विरुद्ध एक पक्षीय कार्यवाही का आदेश पारित किया गया ।

वादिया की ओर से एक पक्षीय साक्ष्य के रूप में स्वयं को पी0डब्लू1 के रूप में प्रस्तुत कराया गया है जिसके बयानों से वादपत्र के कथनों का पूर्ण रूप से समर्थन किया गया है । वादिया की ओर से शादी में दिये गये सामान की सूची (टाइपशुदा) रिक्वाडपत्र के साथ संलग्न की गयी है । वादिया की ओर से विद्वान अधिवक्ता द्वारा यह तर्क प्रस्तुत किया गया है कि विपक्षी जानबूझकर उपस्थित नहीं होता है और न ही वादिया का स्त्री धन, इददत अवधी का भरण पोषण, मेहर की रकम आदि न भी अदा नहीं की कर रहा है । उल्लेखनीय है कि वादिया द्वारा दिनांक 12.1.07 को अपने निकाह मुस्लिम रीति रिवाज के अनुसार अजमत अली के साथ होना बताया गया है । शादी के दौरान कपड़े जेवर आदि दिया जाने का भी कथन किया गया है । अजमत अली को विपक्षी द्वारा दिनांक 27.8.08 को तलाक दिया जा चुका है ।

[illegible][illegible]

(१) विचार के द्वारा अज्ञान का नाश होना चाहिए किन्तु ज्ञान प्राप्त करने के लिए हमें अपने मन को तैयार करना पड़ेगा।

[illegible][illegible]

प्रत्यक्ष भाषा में प्रतिबलवत्ता आभास में लपटावत नहीं होता । उलट-उलट
आवृत्तकर उपस्थित होने की शक्ति की गती में दृष्टान्तित उपलब्ध होने की
कालावधि एक पक्षीय रूप से अनुसंधान की गयी है । यद्यपि अपने काल में ही
में पूर्ण रूप से समाप्त रहती है परन्तु इसी पर ऐसा कोई शङ्क उभरता नहीं है । अतः
आभास पर गतिविधि के द्वारा गतिविधि पर में किसी भी रूप में आभास पर
निम्न जा सक । यदि की परिस्थिति में परिचित एक पक्षीय रूप से निर्दिष्ट निम्न
माने योग्य है ।

3774

[illegible]

19.5.2012

(မြန်မာ့ ဗဟိုဥက္ကဋ္ဌ)

ՀՀ-ում արվում են հին հիմք

10-73111-1

[illegible]

19.5.2012

(2000 年 11 月 1 日)

အထူးစွာ စူးစူးလေးလေး ခုတ် ခုတ်

1. 10-10-01 10:10:00

न्यायालय अपर मुख्य न्यायिक दण्डाधिकारी, पोर्ट संख्या 08, अलीगढ़।

उपरिस्थित:- असद अहमद हाशमी,

उ० प्र० न्यायिक सेवा।

मुकदमा संख्या :- 472/11/10

1. सैयद हुमरा उम्र लगभग 27 वर्ष पुत्री श्री सैयद राशिद भकदर निवासी जैदी कगगाउण्ड
बदरवाग थाना सिविल लाईन्स जिला अलीगढ़।

—-प्रार्थिया

वनाम

1. श्री सैयद इमरान आगा उम्र लगभग 30 वर्ष पुत्र स्वर्गीय श्री आगा अली निवासी सायबाग
री-1, कुलसूम एन्वलेव अपोजिट रियाज कॉलौनी बरोली रोड थाना क्वार्सी जिला अलीगढ़।

—-विपक्षी

अ० धारा -3/4 मुस्लिम महिला

तलाक पर अधिकारी का संरक्षण

दावेनियम, 1986।

थाना- सिविल लाईन्स, अलीगढ़।

निर्णय

प्रस्तुत वाद प्रार्थिया ने अन्तर्गत धारा 3/4 मुस्लिम महिला (तलाक पर अधिकारों का संरक्षण) अधिनियम, 1986 विपक्षी सैयद इमरान आगा के विरुद्ध संस्थित किया है।

राक्षेप में प्रार्थिया का कथन है कि वादिनी की शादी मुस्लिम रीति रिवाज से विपक्षी के साथ दिनांक 25-12-2007 को सम्पन्न हुई थी। वादिनी की शादी में दान दहेज आदि चार लाख रुपये वादिनी के पिता ने खर्चा दिया था। जिसमें मोटर साईकिल कलर टी0वी0, कूलर, फ्रिज, एवं आज के दौर की सभी चीज जरूरत की चीजे फर्नीचर आदि लिस्ट के मुताबिक देकर मय दान दहेज विपक्षी के साथ बतौर पत्नी रखसत किया था एवं वादिनी के निकाह में मेहर मुबलिग पचास हजार रुपये इन्दल तलब सिक्का रायजुल वक्त बंधी थी। वादिनी की शादी में दिये गये उक्त दान दहेज से विपक्षी पति एवं उनके परिवार वाले खुश नहीं हुये और अपनी कार की लियाकत बताकर अतिरिक्त दहेज में कार की मांग करने लगे एवं वादिनी व वादिनी के पिता द्वारा असमर्थता प्रकट करने पर वादिनी के साथ मारपीट जुल्म ज्यादाती करते रहे एवं वादिनी व पिता वादिनी एवं अजीज रिश्तेदारों के समझाने पर भी बाज नहीं आये। इतने पर भी वादिनी की खातिर वादिनी के पिता ने वादिनी के पति को बीस हजार रुपये और दिये थे एवं खातिरदारी में काफी खर्चा किया था। उक्त इखराजात करने पर भी वादिनी को ससुराल में ठीक नहीं रखा और वादिनी का शोषण एवं उत्पीडन बराबर चलता रहा। फिर भी वादिनी का पति अक्टूबर सन् 2008 के आखिरी सप्ताह में वादिनी को मायके में लाकर इस धमकी के साथ छोड़ गया कि जब बाप से कार दिलवा दोगी तभी तुमको बुलाकर ले जाऊंगा नहीं तो तलाक माँगने का तुम्हारे उपर इल्जाम लगाकर तुम्हें तलाक दे दूंगा और दूसरी शादी मालदार घराने की लड़की से कर लूंगा। उसके बाद विपक्षी पति की वादिनी के पिता काफी खुशामद आग्रह कर चुके हैं कि मेरी बेटी को तंग व परेशान मत करो और इसे अपने घर बुलाकर ले जाओ। घटना दिनांक 26-12-2008 प्रात दस बजे की है कि मेरे पति व मेरी सास और ननद मेरे पिता के घर मायके में आये और मेरे व पिता के आजजी से पेश आने पर भी बोले कि हमारी कार की मांग पूरी करो वरना विपक्षी तुम्हारी बेटी को तलाक देकर दूसरी शादी कर लेगा और वादिनी के पिता के ये कहने पर कि मैं ए०एम०यू० का रिटायर्ड टीचर एवं न्यायव्यवस्था में मेरे और भी खानगी इखराजात है मैं आपकी कार की मांग पूरी नहीं कर सकता हूँ। इस पर मुझे व मेरे पिता को गन्दी-2 गॉलिया देने लगे व जान से मारने की धमकी देते-तेरे जंगल करने लगे। शोर पर गवाहान के आ जाने पर भी जाते समय जान से मारने व तहरीर तलाक भेजने की धमकी देकर चले गये। जिसकी बावत बाद विचाराधीन है। अतिरिक्त दहेज की मांग पूरी न होने पर विपक्षी ने लिखित व मौखिक तलाक दे दिया है। एवं वादिनी को नान्यतम देकर वादिनी की सिटगी बर्नात करने की है तथा जमीन पर है।

न्यायव्यवस्था

जिला

सुप्रीम
चौधरी

गं तलाक कम्यूनिकेट हो गई है। जिसके कारण पति की जौजियत से वादिनी अलग और आजाद हो गई है एवं उभय पक्षों के मध्य पति पत्नी का रिश्ता खत्म हो गया है एवं अब वादिनी तलाकशुदा महिला होने के कारण विपक्षी के विरुद्ध उचित वाद मजबूरी में प्रस्तुत कर रही है। विपक्षी आदि के विरुद्ध महिला उत्पीड़न व दहेज एक्ट का किमिनल बार न्यायालय श्रीमान सौ० जे० एम० अलीगढ में पेंडिंग है जिसकी गिरफ्तारी से बचने हेतु विपक्षी ने माननीय उच्च न्यायालय इलाहाबाद में रिट प्रस्तुत की थी। जिसमें भी विपक्षी ने तलाक को कम्पलीट कन्फर्म कर दिया है। विपक्षी डिपार्टमेंट आफ आरचीटैक्चर जैड एच सी ई टी, ए० एम० यू० अलीगढ में लैबरेटर के पद पर कार्यरत है एवं मकान व अन्य चल अचल सम्पत्ति विपक्षी के नाम है एवं सभी जराये से उन्हें लगभग 60,000/रुपये प्रतिमाह की आमदनी है एवं विपक्षी का लिविंग स्टैंडर्ड काफी अच्छा है इसकी मददेनजर वादिनी के पिता ने उसके साथ अपना सामाजिक स्तर देखकर शादी की थी। लिहाजा विपक्षी वादिनी को में मांगे गये अनुतोषों की अदायगी बाआसानी कर सकता है।

प्रस्तुत वाद में विपक्षी पर तामील पर्याप्त थी। विपक्षी न्यायालय में उपस्थित हुआ। विपक्षी ने अपना प्रतिवादपत्र न्यायालय में प्रस्तुत किया। जिसमें उसने प्रार्थिया को अपनी विवाहिता पत्नी होना स्वीकार किया है तथा शेष कथनों से इंकार करते हुये कथन किया है कि विपक्षी न प्रार्थिया को शादी दिनांक 25-12-2007 को मुस्लिम रीति रिवाज के अनुसार साधारण तरीके से हुई थी और कुछ उपहार शादी के समय दिये गये थे। विपक्षी के द्वारा कहा गया है कि शादी में जो उपहार दिये गये थे वह उन्हें किसी भी समय वापस करने के लिये तैयार है और उसके द्वारा दिनांक 24-2-2009 को एक पत्र भेजा गया था कि आप अपना सामान प्राप्त कर लें। लेकिन निकाह के समय कोई लिस्ट सामान नहीं बनाई गई थी। विपक्षी के द्वारा मेहर प्रार्थिया को अदा की गई थी। विपक्षी व उसके परिवार वालों द्वारा कभी भी अतिरिक्त दहेज में मांग प्रार्थिया से नहीं की गई। जब कि प्रार्थिया स्वयं यहाँ से गई है। उपरोक्त आधार पर प्रार्थना पत्र निरस्त किये जाने की याचना की गई है।

प्रार्थिया की ओर से मौखिक साक्ष्य के रूप में स्वयं को ए० पी० डब्लू०-1 के रूप में स्वयं को परीक्षित कराया गया है तथा ए० पी० डब्लू०-2 के रूप में सैयद राशिद अकबर का शपथ पत्र प्रस्तुत किया गया है, परन्तु विपक्षी को पर्याप्त अवसर दिया गया, उसके बावजूद भी विपक्षी के द्वारा उनसे जिरह नहीं की गई तथा दिनांक 1-3-12 को विपक्षी को साक्ष्य का अवसर समाप्त कर दिया गया। फिर पत्रावली को बहस हेतु नियत कर दी गई। प्रार्थिया के विद्वान अधिवक्ता को सुना गया परन्तु पर्याप्त अवसर दिये जाने के बावजूद भी विपक्षी की ओर से कोई भी बहस करने हेतु उपस्थित नहीं हुआ।

प्रस्तुत प्रकरण अन्तर्गत धारा 3/4 मुस्लिम महिला (विवाह विच्छेद पर अधिकारों का संरक्षण), अधिनियम 1986 से सम्बंधित है।

पत्रावली के अवलोकन से स्पष्ट है कि उभय पक्ष का विवाह दिनांक 25-12-2007 को मुस्लिम रीति रिवाज के अनुसार सम्पन्न हुआ था। परन्तु विपक्षी ने वादिया को तलाक दे दिया है और वादिया ने अपनी इददत की अवधि पूर्ण करने के पश्चात दूसरा विवाह कर लिया है। जिससे उसके एक बच्चा है और वर्तमान समय में वादिनी अपने दूसरे पति के साथ दिल्ली में निवासरत है।

वादिनी की ओर से यह कहा गया है कि विवाह में मेहर की धनराशि मुबलिग पचास हजार रुपये तय हुई थी। जिसको विपक्षी ने अदा नहीं किया। इसके विपरीत विपक्षी ने अपने प्रतिवादपत्र में कहा है कि "मेहर-ए-मुवज्जल की रकम बंधी थी। जिसको उसके द्वारा मेहर की अदायगी तुरंत कर दी गई। मैंने उभय पक्ष के कथनों के परिप्रेक्ष्य में पत्रावली पर उपलब्ध प्रतिलिपि निकाहनामा उर्दू व अनुवाद हिन्दी का अवलोकन किया। जिसके अवलोकन से स्पष्ट है कि मेहर की धनराशि मुबलिग पचास हजार रुपये सिक्का रायजुल वक्त इन्दल तलय लिखा हुआ है। उक्त निकाहनामा में मेहर-ए-मुअज्जल अथवा मुवज्जल नहीं लिखा हुआ है। परन्तु " इन्दल वक्त तलय सितवक

और कम्प्यूटर की भी क्लास लेता था। इसके अतिरिक्त वादिया स्वयं पैसों की खातिर दो हजार रुपये वेतन पर स्कूल में पढ़ाती थी। इसके अतिरिक्त विवाह में उसके पिता ने विपक्षी को एक मोटरसाइकिल व अन्य सामान दिया था और विपक्षी के द्वारा कार की मीन की गई। विपक्षी के पिता स्वयं टीचर थे। जो सेवानिवृत्त हो गये हैं। इन सभी तथ्यों से यह स्पष्ट है कि उभय पक्ष का जीवन स्तर मध्यम वर्गीय परिवार का जीवन स्तर है। वादिया अपने प्रथम विवाह से पूर्व अथवा विवाह के पश्चात् उच्चस्तरीय ज्वीन व्यतीत नहीं कर रही थी। इसके अतिरिक्त वर्तमान समय में उसके द्वारा अपना द्वितीय विवाह अन्य किसी व्यक्ति से कर लिया गया है और वह दिल्ली में निवासरत है। वादिया के द्वितीय विवाह से एक पुत्र है। वादिया वर्तमान समय में खुशहाल जीवन व्यतीत कर रही है। वादिया का द्वितीय विवाह हो चुका है। विपक्षी वर्तमान समय में बेरोजगार है। ऐसी दशा में वादिया दत्तौर उचित व्यवस्था (फेयर प्रावीजियन) मुदलिंग पॉच लाख रुपये प्राप्त करने की अधिकारिणी नहीं है। जहाँ तक वादिया के द्वारा यह कहा गया है कि उसके पिता ने विपक्षी को बीस हजार रुपये दिये थे। उक्त के परिप्रेक्ष्य में पत्रावली पर कोई रसीद या गवाही उपलब्ध नहीं है। जिसके अभाव में यह तथ्य साबित नहीं है। ऐसी दशा में वादिया बीस हजार रुपये भी प्राप्त करने की अधिकारिणी नहीं है।

पत्रावली पर उपलब्ध समस्त अभिलेखीय साक्ष्यों एवं तथ्यों एवं परिस्थितियों के आधार पर न्यायालय द्वारा निष्कर्ष पर पहुँचती है कि वादिया मेहर की धनराशि मुवलिंग पचास हजार रुपये, इददत का खर्चा 16,666/-रुपये तथा पत्रावली पर उपलब्ध सूची सामान के अनुसार समस्त सामानों को प्राप्त करने की अधिकारी है। तदनुसार दावा वादिनी आंशिक रूप से स्वीकार किये जाने योग्य है। शेष अनुतोष के परिप्रेक्ष्य में दावा वादिनी निरस्त किये जाने योग्य है।

आदेश

उपरोक्तानुसार दावा वादिनी आंशिक रूप से आज्ञाप्त किया जाता है। विपक्षी को निर्देशित किया जाता है कि वह निर्णय के दिनांक से तीस दिन के अंदर मेहर की धनराशि पचास हजार रुपये एवं इददत का खर्चा 16,666/-रुपये तथा सूची में वर्णित समस्त सामानों को वादिनी को अदा करें। शेष अनुतोष के बावत दावा वादिनी निरस्त किया जाता है।

न्यायालय अपर मुख्य न्यायिक मजिस्ट्रेट कोर्ट सं०-८, अलीगढ़।
 उपस्थित :- असद अहमद हाशमी, (उ०प्र० न्यायिक सेवा)
 मुकदमा संख्या :- 70/11/2008

श्रीमती सायमा अजीज आयु लगभग 26 वर्ष पुत्री श्री अजीज जुम्मा खॉ निवासी हाल 5/64, मसूदाबाद, जी०टी० रोड,
 थाना बन्नादेवी, जिला अलीगढ़। वादिया

बनाम

मुशीर खान आयु लगभग 28 वर्ष पुत्र स्व० श्री मुस्ताक खान निवासी जमालपुर, हमदर्द नगर, ए, गोल मार्केट, थाना
 सिविल लाइन जिला अलीगढ़। विपक्षी

धारा :- 3/4 मुस्लिम महिला (विवाह विच्छेद
 पर अधिकारों का संरक्षण) अधिनियम, 1986
 थाना :- बन्नादेवी, अलीगढ़

निर्णय

प्रस्तुत प्रार्थना पत्र प्रार्थिया श्रीमती सायमा अजीज ने अन्तर्गत धारा 3/4 मुस्लिम महिला (विवाह विच्छेद पर अधिकारों का संरक्षण) अधिनियम, 1986 विपक्षी के विरुद्ध इस आशय से प्रस्तुत किया है कि वादिनी को विपक्षी से फेयर प्रोवीजन के रूप में एक लाख रुपये एवं ढाई लाख रुपये अथवा स्त्रीधन/दहेज लिस्ट के अनुसार एवं मेहर के 25,000/- रुपये, इददत खर्चा मुबलिय 16,880/- रुपये एवं वाद व्यय मुबलिय 8000/- रुपये दिलाये जायें।

प्रार्थिया/वादिया का संक्षिप्त कथन है कि प्रार्थिया की शादी दिनांक 05-10-2002 को मुस्लिम रीति-रिवाज के अनुसार विपक्षी मुशीर खान के साथ हुई थी एवं प्रार्थिनी के निकाह में मेहर मुबलिय 25,000/- रुपये बंधी थी जो कि विपक्षी ने आज तक अदा नहीं की है। प्रार्थिनी के वाल्देन ने प्रार्थिनी की शादी में ढाई लाख रुपये दान-दहेज में खर्चा करके नय लिस्ट में तहरीर दान दहेज के प्रार्थिनी को बतौर पत्नी रखसत किया था। शादी के बाद विपक्षी पति एवं सारा श्रीमती सायमा दिये गये दान दहेज से संतुष्ट नहीं हुये और अतिरिक्त दहेज में मोटरसाइकिल व पचास हजार रुपये की माँग करने लगे तथा प्रार्थिनी को तरह-तरह से तंग व परेशान करने लगे कि तू अपने पिता से अतिरिक्त दहेज में मोटरसाइकिल व पचास हजार रुपये लाकर दे नहीं तो तुझे घर में नहीं रखेंगे और तुझे जान से मार देंगे या तुझे तलाक देकर दूसरी शादी कर लेंगे। दिनांक 6/7-04-2003 की रात साढ़े बारह बजे मेरे ऊपर विपक्षी की माँ साबरा ने मिट्टी का तेल डाला तथा विपक्षी मुशीर ने तीली दियासलाई से मुझमें आग लगा दी और 45 प्रतिशत जला दिया। मेरी चीख पुकार पर मोहल्ले के लोग आ गये जिन्होंने गम्भीर हालत में जल्दी से मेडिकल कॉलेज ले जाकर भर्ती करा दिया। उक्त घटना की बाबत मुकदमा अपराध संख्या 142/03 अन्तर्गत धारा 498ए, 323, 504, 506, 307, सेक्टोसं० एवं 3/4 दहेज प्रतिषेध अधिनियम सत्र न्यायालय में विचाराधीन है। प्रार्थिनी ने विपक्षी मुशीर के विरुद्ध वाद संख्या 354/11/04 श्रीमती सायमा अजीज बनाम मुशीर खान धारा 125, द०प्र०सं० का दावर किया जिसमें विपक्षी ने बयान तहरीर में तलाक का आशय लिया कि उसने प्रार्थिनी के मायके में आकर प्रार्थिनी को दिनांक 31-12-03 को तलाक देकर मेहर व इददत की रकम अदा कर दी जो कि कतई झूठी व मनगढ़न्त कहानी थी जिससे कि साबित करने में विपक्षी सफल नहीं हुआ और न्यायालय अपर सिविल जज [क०प्र०] कोर्ट संख्या-02/न्यायिक मजिस्ट्रेट, अलीगढ़ ने विपक्षी की बयान तहरीर में तलाक के आधार को झूठा पाया एवं दिनांक 31-12-03 को तलाक देने के आधार को निरस्त कर दिया। जिसके अनुसार प्रार्थिनी को दिनांक 31-12-03 को तलाक देने का कथन झूठा है बल्कि विपक्षी ने उपस्थित होकर न्यायालय में प्रार्थिनी को दिनांक 14-04-07 को प्रत्यक्ष रूप से अपने मौखिक साक्ष्य के समय तलाक दे दिया जो कि विपक्षी के मौखिक बयान से साबित है। प्रार्थिनी, विपक्षी से तलाकशुदा महिला होने पर स्त्रीधन, दहेज लिस्ट के अनुसार जो विपक्षी के कब्जे में है एवं मेहर मुबलिय 25,000/- रुपये एवं इददत खर्चा 16,880/- रुपये भी पाने की अधिकारिणी है जिसकी अदायगी तलाक देने पर विपक्षी ने प्रार्थिनी को आज तक अदा नहीं की है। प्रार्थिनी घरेलू महिला है एवं वह कोई कार्य सिलाई, बुनाई, कढ़ाई आदि का नहीं जानती है जबकि विपक्षी बिजली फिटिंग का कार्य ठेकेदारी पर कोठी-बिल्डिंगों में करता है एवं वीडियोग्राफी व आर्केस्ट्रा का काम करता है एवं उसका पक्का मकान है जिसके किराये आदि समस्त जराय से उसे लगभग 20,000/- रुपये प्रतिमाह की आमदनी है जिससे वह उक्त मुतालबा व रकम की अदायगी वा आसानी कर सकती है जो उसने हठधर्मी से आज तक अदायगी नहीं की है। उपरोक्त परिस्थिति में विपक्षी से अतिशीघ्र फेयर प्रोवीजन के रूप में एक लाख रुपये व ढाई लाख रुपये या लिस्ट के अनुसार स्त्रीधन, दहेज एवं मेहर मुबलिय 25,000/- एवं इददत खर्चा मुबलिय 16,880/- रुपये प्रार्थिनी को दिलाये जाने का अनुरोध किया गया है।

विपक्षी की ओर से प्रतिवादपत्र प्रस्तुत करते हुये कथन किया गया है कि विपक्षिया स्वेच्छा से बिना किसी उचित कारण के उत्तरदाता का घर छोड़कर चली गयी थी। निकाह के बाद उसने कभी एक अच्छी पत्नी के रूप में अपने कर्तव्यों का पालन नहीं किया हमेशा उत्तरदाता एवं उसकी वृद्ध माँ के साथ दुर्व्यवहार करती थी तथा किसी कारण से निकाह के बाद से ही अपने मागके में रहने की इच्छुक रही। धारा 125, द0प्र0सं0 के बाद में न्यायालय ने पक्षकारों के मध्य हुये तलाक को स्वीकार नहीं किया है। उक्त आदेश आज की तिथि तक प्रभाव में है। धारा 41 साक्ष्य अधिनियम के अन्तर्गत किसी सक्षम न्यायालय द्वारा वैवाहिक सम्बन्धों के सम्बन्ध में दिये गये निर्णय इस बात का निश्चायक सबूत होते हैं कि पक्षकारों के मध्य अभी तलाक नहीं हुआ है। इस सम्बन्ध में सक्षम न्यायालय द्वारा पारित आदेश सुसंगत तथा है एवं साक्ष्यों के आधार पर प्रभावी माना जाता है। इस विधिक अवधारणा के अनुसार जबकि पक्षकारों के मध्य हुये तलाक को स्वीकार नहीं किया गया है। विपक्षिया द्वारा मुस्लिम बीमेन एक्ट के अन्तर्गत प्रस्तुत वाद पोषणीय नहीं हो सकता तथा केवल उसी आधार पर विपक्षिया द्वारा प्रस्तुत उपरोक्त वाद खण्डित होने योग्य है तथा विपक्षिया उक्त अधिनियम के अन्तर्गत किसी प्रकार का अनुतोष प्राप्त करने की अधिकारिणी नहीं है।

वादिनी की ओर से अपने वादपत्र के कथनों के समर्थन में मौखिक साक्ष्य में ए0पी0डब्ल्यू0-01 के रूप में स्वयं को परीक्षित कराया गया है तथा ए0पी0डब्ल्यू0-02 के रूप में अजीज जुम्मा खों को परीक्षित कराया गया है। दस्तावेजीय साक्ष्य में वादिया की ओर से प्रतिलिपि: दहेज सामान की लिस्ट, निकाहनामा की छायाप्रति, अदीब माहिर के अंकपत्र दिनांकित 25 सितम्बर 1997 की छायाप्रति, अदीब कामिल के अंकपत्र दिनांकित 22 अक्टूबर 1998 की छायाप्रति, हाईस्कूल परीक्षा वर्ष 1995 का प्रमाणपत्र, इण्टरमीडिएट परीक्षा 2002 के अंकपत्र एवं प्रमाणपत्र की छायाप्रति, निवास प्रमाणपत्र की छायाप्रति, न्यायालय जे0एम0 प्रथम द्वारा वाद संख्या 472/11/97 श्रीमती सायमा बनाम मुशीर धारा 3/4 मुस्लिम बीमेन्स प्रोटैक्शन ऑफ राइट्स ऑन डाइवर्स एक्ट 1986, थाना बन्नादेवी, अलीगढ़ में पारित एकपक्षीय निर्णय दिनांकित 16-01-08 की सत्यप्रति, न्यायालय अपर सिविल जज जू0डि0। कोर्ट सं0-2/न्यायिक मजिस्ट्रेट, अलीगढ़ द्वारा वाद संख्या 216/11/06 श्रीमती सायमा अजीज बनाम मुशीर खान धारा 125, द0प्र0सं0 थाना सिविल लाइन, अलीगढ़ में पारित निर्णय दिनांकित 28-05-2007 की सत्यापित प्रति, उक्त वाद में ओ0पी0 डब्ल्यू0-01 के रूप में मुशीर अहमद खान के बयान की सत्यप्रति दाखिल की गयी है।

विपक्षी की ओर से मौखिक साक्ष्य में स्वयं को ए0पी0डब्ल्यू0-01 के रूप में परीक्षित कराया गया है। कोई भी दस्तावेजीय साक्ष्य विपक्षी की ओर से दाखिल नहीं किया गया है।

उभय पक्ष के विद्वान अधिवक्ता को सुना तथा पत्रावली का अवलोकन किया गया। उभय पक्षों के अभिवचनों के आधार पर वाद के उचित निस्तारण हेतु निम्नलिखित अवधार्य बिन्दु विरचित किये जाते हैं :-

- 1- क्या विपक्षी ने वादिया को दिनांक 31-12-03 अथवा 14-04-07 को तलाक दे दिया है ? यदि हाँ तो प्रभाव ?
- 2- क्या विपक्षी ने तलाक के उपरांत वादिया को मेहर व इद्दत की धनराशि की अदायगी कर दी है और दान दहेज वापस कर दिया है ?
- 3- क्या धारा 125, द0प्र0सं0 के अन्तर्गत पारित निर्णय दिनांकित 28-05-07 इस न्यायालय पर धारा 41 साक्ष्य अधिनियम के अन्तर्गत बाध्यकारी है ?
- 4- अनुतोष ?

निस्तारण अवधार्य बिन्दु संख्या 01 :-

यह अवधार्य बिन्दु इस आशय का बनाया गया है कि "क्या विपक्षी ने वादिया को दिनांक 31-12-03 अथवा 14-04-07 को तलाक दे दिया है ? यदि हाँ तो प्रभाव ?"

पत्रावली पर उपलब्ध वादपत्र एवं प्रतिवादपत्र के अवलोकन से स्पष्ट है कि वादिया का विवाह विपक्षी के साथ दिनांक 05-10-02 को मुस्लिम रीति-रिवाज के अनुसार हुआ था जिसमें एक निकाहनामा लिखा गया था। वादिया की ओर से उक्त निकाहनामा की प्रतिलिपि व हिन्दी अनुवाद दाखिल किया गया है। उक्त निकाहनामा से स्पष्ट है कि वादिया सायमा पुत्री अजीज जुम्मा खों का विवाह मुशीर अहमद खान के साथ दिनांक 05-10-02 को हुआ था जिसमें मेहर की रकम मुबलिग 25,000/- रुपये अंकित है। इससे स्पष्ट है कि उभय पक्ष के मध्य हुये विवाह में मेहर की रकम 25,000/- रुपये तय पायी गयी थी।

वादिया ने प्रस्तुत वाद विपक्षी के विरुद्ध इस आधार पर संस्थित किया है कि विपक्षी ने उसे दिनांक 14-04-07 को प्रत्यक्ष रूप से तलाक दे दिया है परन्तु उसके द्वारा मेहर व इद्दत व स्त्रीधन की वापसी व अदायगी नहीं की गयी है। इस बिन्दु पर वादिया के द्वारा अपनी जिरह में किये गये कथन उल्लेखनीय है जिसमें कहा गया है कि "इस मुकदमे से पहले मैंने खर्च का मुकदमा दायर किया था। पहले वाला मुकदमा खर्च का था, जब तक तलाक नहीं हुआ था। पहले वाले मुकदमे में अदालत ने तलाक हम दोनों के बीच मान लिया था जो विपक्षी ने तलाक उसे

न्यायालय में खड़े होकर दिया। पहले वाले मुकदमे में अदालत ने हम दोनों के बीच तलाक होने को स्वीकार कर लिया था। उस मुकदमे में कोई खर्चा नहीं बचा था। उसके बाद मैंने दूसरा मुकदमा दायर किया है। अब मेरा निकाह शाहनवाज के साथ हो गया है। तलाक के बाद। यह कहना गलत है कि 125 द0प्र0सं0 के मुकदमे में अदालत ने हम दोनों के बीच तलाक होने की बात को माना हो।

साक्षिया के उपरोक्त बयानों से स्पष्ट है कि जब साक्षिया ने एक मुकदमा अन्तर्गत धारा 125 द0प्र0सं0 विपक्षी के विरुद्ध दायर किया था तो उक्त मुकदमे में विपक्षी ने प्रतिवादपत्र प्रस्तुत करते हुये वादिया को दिनांक 31-12-03 को तलाक दिये जाने का कथन किया था जिसे उक्त न्यायालय द्वारा अपने निर्णय दिनांकित 28-05-07 में नहीं माना था क्योंकि उस समय विपक्षी इस बात को साबित करने में असफल रहा था कि उसने वादिया को दिनांक 31-12-03 को तलाक दे दिया था। साक्षिया के बयान से यह भी स्पष्ट है कि धारा 125, द0प्र0सं0 के वाद के लम्बन के दौरान विपक्षी ने न्यायालय के समक्ष प्रत्यक्ष रूप से वादिया को दिनांक 14-04-07 को तलाक दे दिया था। जहाँ तक साक्षिया का कथन है कि पहले वाले मुकदमे में न्यायालय ने तलाक मान लिया था, उक्त का तात्पर्य प्रस्तुत प्रकरण में पूर्व में हुये एकपक्षीय निर्णय से है, जिसे न्यायालय द्वारा इस वाद में एकपक्षीय रूप से निर्णीत करते हुये तलाक को स्वीकार कर लिया था।

इस बिन्दु पर विपक्षी ने बतौर ओ0पी0डब्ल्यू0-01 अपनी जिरह में यह कहा है कि "उसकी शादी सायमा से 05-10-02 को हुई थी। सायमा उससे अपनी इच्छा से अलग रह रही है तलाक की वजह से अलग नहीं हुई। धारा 125, द0प्र0सं0 का वाद सायमा ने मेरे विरुद्ध दायर किया था उसमें मैं हाजिर हुआ था और उसमें डब्ल्यू0एस0 भी दिया था और उसमें हमने बयान भी दिये थे। मैं इन सब बातों को सही मानता हूँ। मेरी तरफ से धारा 125, द0प्र0सं0 वाले वाद में गवाही हासन और नौशाद ने दी थी। यह गवाह मेरी तरफ से पेश हुये थे। मैं इस बात को भी मानता हूँ कि यह बात एकदम सही है कि 31-12-03 को सायमा के मायके में जाकर उनकी माँ के सामने तीन बार तलाक दिया था। यह बात मेरे 125 द0प्र0सं0 के बयानों में दर्ज है। इस तलाक को सायमा की माँ व मेरे साथ गये हुये लोगों ने सुना था।"

मैंने विपक्षी/साक्षी के बयानों के परिप्रेक्ष्य में प्रभावली पर उपलब्ध सत्यप्रतिलिपि निर्णय पारित अन्तर्गत धारा 125, द0प्र0सं0 सायमा बनाम मुरीर का अवलोकन किया। उक्त निर्णय में विपक्षी के प्रतिवादपत्र का उल्लेख है जिसमें उसके द्वारा यह कहा गया है कि मेहर की राशि 25,000/- हैसियत के अनुसार अंकित की गयी और मैंने दिनांक 31-12-03 को विपक्षी (अर्थात् वादिया) को हासन भाई व नौशाद खान व वादिया की माँ की उपस्थिति में सांय 4:00 बजे वादिया के घर जाकर उसे तलाक दे दिया वह मेहर की राशि 25,000/- रुपये व इद्दत की धनराशि 10,000/- रुपये अदा कर पत्नी बंधन से मुक्त कर दिया। चूँकि विपक्षी ने वादिया को तलाक दे दिया इसलिये वादिया किसी भी भरण-पोषण धनराशि को प्राप्त करने की अधिकारिणी नहीं है। उक्त धारा 125, द0प्र0सं0 के वाद में विपक्षी मुरीर अहमद ने बतौर ओ0पी0डब्ल्यू0-01 अपना बयान अंकित कराया था और अपनी जिरह दिनांकित 11-04-07 के अंतिम पृष्ठ पर प्रथम पंरा में यह कहा है कि "मैंने तलाक के समय सायमा को आजाद कर दिया तलाक हो चुका है, तलाक कन्फर्म है इसलिये सायमा को अपने साथ नहीं रख सकता।"

उपरोक्त वर्णित धारा 125, द0प्र0सं0 के वाद में दाखिल प्रतिवादपत्र एवं जिरह में किये गये कथनों से यह स्पष्ट है कि विपक्षी ने अपने प्रतिवादपत्र एवं जिरह में यह स्वीकार किया है कि उसने वादिया को तलाक दे दिया था परन्तु न्यायालय द्वारा उक्त निर्णय में विपक्षी के इस कथन को कि उसने दिनांक 31-12-03 को वादिया को तलाक दे दिया है उचित एवं साबित नहीं पाया था जिसके आधार पर न्यायालय द्वारा अपने उक्त निर्णय में यह निष्कर्ष दिया गया था कि विपक्षी इस तथ्य को साबित करने में असफल रहा है कि उसने वादिया को दिनांक 31-12-03 को तलाक दे दिया है। इसी स्तर पर इस तथ्य का उल्लेख किया जाना आवश्यक है कि धारा 125, द0प्र0सं0 के वाद में तलाकशुदा पत्नी जब तक वह द्वितीय विवाह न कर ले तब तक भरण-पोषण प्राप्त करने की अधिकारिणी होती है। अतः विवाह विच्छेद/तलाक के निर्णय में निष्कर्ष दिये जाने की कोई आवश्यकता नहीं होती। इसके बावजूद भी उक्त निर्णय में दिया गया कोई भी निष्कर्ष इस न्यायालय पर बाध्यकारी अथवा सुसंगत नहीं है क्योंकि दोनों की प्रक्रिया एक दूसरे से भिन्न है।

प्रस्तुत प्रकरण में वादिया की ओर से अपने वादपत्र में यह कथन किया गया है कि विपक्षी ने उसे दिनांक 31-12-03 को तलाक न देकर दिनांक 14-04-07 को न्यायालय के समक्ष प्रत्यक्ष रूप से तलाक दे दिया था और यह तथ्य इस बात से भी साबित है कि वादिया ने अपनी जिरह दिनांकित 31-05-12 में यह कहा है कि करीब चार साल पहले लगभग वर्ष 2008 में उसने विपक्षी से तलाक होने के पश्चात अपना दूसरा विवाह शाहनवाज नाम के दूसरे व्यक्ति से कर लिया है। इसका तात्पर्य यह हुआ कि उभयपक्ष के मध्य तलाक वादिया के कथनानुसार दिनांक 14-04-07 को ही हुआ था जिसके पश्चात वादिया ने अपना द्वितीय विवाह एक अन्य शाहनवाज नामक व्यक्ति से कर

लिया जिससे उसकी दो सन्तानें हैं। विपक्षी मुशीर ने न्यायालय के समक्ष जो बयान अन्तर्गत धारा 125, द०प्र०सं० के वाद में दिया है उसमें तलाक देने की बात कही है और यह भी कहा है कि तलाक के पश्चात उसने अपनी पत्नी को आजाद कर दिया है। इस तरह से भी विपक्षी का आशय तलाक के सम्बन्ध में स्पष्ट है और उसके न्यायालय के समक्ष दिये गये बयानों के समय तलाक के सम्बन्ध में सूचना एवं उद्घोषणा वादिया के प्रति पूर्ण हो जाती है और उक्त सूचना दिनोंक 14-04-07 को पूर्ण है। इसके अतिरिक्त मौखिक साक्ष्य के समय तलाक की बात पति के द्वारा कहे जाने से भी तलाक दिया जाना साबित हो जाता है। पत्रावली के अवलोकन से यह भी स्पष्ट है कि उभय पक्ष सुन्नी मुस्लिम सम्प्रदाय के अनुयायी हैं और मुस्लिम विधि के अनुसार यदि कोई व्यक्ति अपनी पत्नी को केवल मौखिक रूप से ही तलाक दे देता है और उसकी सूचना एवं उद्घोषणा की जानकारी पत्नी को किसी भी माध्यम से हो जाती है तो वह तलाक पूर्ण माना जाता है। इस सम्बन्ध में विधि व्यवस्था 1995 जे.आई.सी. 306 इलाहाबाद उल्लेखनीय है जिसमें माननीय उच्च न्यायालय इलाहाबाद ने यह अभिमत व्यक्त किया है कि यदि प्रतिवादपत्र में तलाक की उद्घोषणा कर दी गयी है तो प्रतिवादपत्र प्रस्तुत किये जाने की तिथि को तलाक प्रभावी माना जायेगा। जैसा कि विपक्षी ने वादिया को तलाक देने का कथन एवं मन्तव्य धारा 125 द०प्र०सं० के बयानों में किया है और उक्त कथन के पश्चात विपक्षी के द्वारा यह कथन करना कि उभय पक्ष के मध्य तलाक नहीं हुआ मात्र विपक्षी के विद्वेषपूर्ण मन्तव्य को दर्शाता है कि वह प्रस्तुत प्रकरण में दिये जाने वाले अनुतोष से बचना चाहता है जबकि उसने वादिया को न्यायालय के समक्ष वादिया की उपस्थिति में प्रत्यक्ष रूप से दिनोंक 14-04-07 को तलाक देकर उसे विवाह बंधन से मुक्त कर दिया है और तलाक के पश्चात वादिया विपक्षी की तलाकशुदा पत्नी है। फलस्वरूप यह स्पष्ट है कि विपक्षी ने दिनोंक 14-04-07 से पूर्ण तलाक दिये जाने का कथन किया है और उसकी सूचना व उद्घोषणा दिनोंक 14-04-07 को वादिया के समक्ष तलाक देकर पुनः की जिसके अनुसार तलाक दिनोंक 14-04-07 को ही दिया जाना पूर्ण एवं साबित है। तदनुसार अवधार्थ बिन्दु संख्या 01 वादिया के पक्ष में विपक्षी के विरुद्ध सकारात्मक रूप से निर्णीत किया जाता है।

निस्तारण अवधार्थ बिन्दु संख्या 02 :-

यह अवधार्थ बिन्दु इस आशय का बनाया गया है कि "क्या विपक्षी ने तलाक के उपरान्त वादिया को मेहर व इद्दत की धनराशि की अदायगी कर दी है और दान दहेज वापस कर दिया है ?"

पत्रावली पर उपलब्ध वादपत्र एवं प्रतिवादपत्र तथा अन्य अभिलेखीय साक्ष्य से यह स्पष्ट है कि वादिया का विवाह विपक्षी के साथ दिनोंक 05-10-02 को हुआ था और उक्त के परिप्रेक्ष्य में एक निकाहनामा लिखा गया था जिसकी प्रतिलिपि एवं हिन्दी अनुवाद पत्रावली पर दाखिल है जिसमें मेहर की धनराशि मुद्रलिपि 25,000/- अंकित है। इसी प्रकार विवाह में दिये गये दान दहेज के सम्बन्ध में पत्रावली पर दाखिल लिस्ट दहेज के सामान से स्पष्ट है कि दिनोंक 05-10-02 को वादिया की ओर से उसे विवाह में लिस्ट में अंकित सामानों को दिया गया था जिस पर विपक्षी की ओर से प्राप्ति के हस्ताक्षर तथा दिनोंक अंकित है, इससे भी यह स्पष्ट है कि विवाह में दान दहेज दिया गया था। जहाँ तक तलाक के पश्चात मेहर व इद्दत की रकम की अदायगी का प्रश्न है तो इस सम्बन्ध में मैंने उभय पक्ष की ओर से किये गये मौखिक कथनों का अवलोकन किया। विपक्षी ने अपनी जिरह दिनोंकित 05-04-13 में कथन किया है कि "यह बात सही है कि पहले एकपक्षीय निर्णय हुआ है उसमें लिखित दहेज, मेहर या इद्दत का खर्चा या फेयर प्रोवीजन के अन्तर्गत कोई पैसा या खर्चा या सामान वापस नहीं किया।" विपक्षी के उक्त कथन से यह स्पष्ट है कि विपक्षी ने तलाक के पश्चात वादिया को मेहर व इद्दत का खर्चा फेयर प्रोवीजन के अन्तर्गत कोई पैसा या खर्चा अथवा दहेज के सामान को न ही दिया और ना ही वापस लिया है। इस तथ्य की ओर पुष्टि विपक्षी के ही धारा 125 द०प्र०सं० के अन्तर्गत किये गये मौखिक साक्ष्य से भी होती है जिसमें विपक्षी ने अपनी जिरह दिनोंकित 11-04-07 के अन्तिम पृष्ठ के मध्य में कहा है कि "दहेज जो दिया था वह उसके घर पर है वह लिस्ट के अनुसार है। इसी प्रकार साक्षी ने अपनी उसी जिरह के प्रथम पृष्ठ के अन्तिम पैरा में कहा है कि "मेहर 25,000/- रुपये थी, इद्दत का खर्चा 1500/- रुपये था रसीद नहीं करायी थी।" विपक्षी के उपरोक्त बयान से स्पष्ट है कि विपक्षी ने तलाक के पश्चात वादिया को मेहर के रूप में 25,000/- रुपये, इद्दत की धनराशि की अदायगी नहीं की है और ना ही सूची के अनुसार दहेज के सामान को वापस किया है और ना ही फेयर प्रोवीजन के रूप में किसी भी खर्च को दिया है। जैसा कि विपक्षी ने वादिया को दिनोंक 14-04-07 को तलाक दे दिया है परन्तु विपक्षी ने तलाक के उपरान्त वादिया को मेहर व इद्दत की धनराशि, दहेज के सामान की वापस नहीं की है और ना ही फेयर प्रोवीजन के रूप में किसी भी धनराशि की अदायगी की है, जिस तलाक के पश्चात वादिया विपक्षी से प्राप्त करने की अधिकारी है। तदनुसार अवधार्थ बिन्दु संख्या 02 वादिया के पक्ष में विपक्षी के विरुद्ध नकारात्मक रूप से निर्णीत किया जाता है।

निस्तारण अवधार्थ बिन्दु संख्या 03 :-

यह अवधार्थ बिन्दु इस आशय का बनाया गया है कि "क्या धारा 125, द०प्र०सं० के अन्तर्गत पारित निर्णय दिनोंकित 28-05-07 इस न्यायालय पर धारा 41 साक्ष्य अधिनियम के अन्तर्गत वाध्यकारी है ?"

पत्रावली के अवलोकन से स्पष्ट है कि उभय पक्ष के मध्य एक वाद धारा 125, द०प्र०सं० सायमा बनाम मुशीर अहमद चला था जिसमें न्यायालय द्वारा गुण-दोष के आधार पर दिनांक 28-05-07 निर्णय पारित किया था। उक्त वाद धारा 125, द०प्र०सं० के अन्तर्गत था जो अर्द्ध फौजदारी (Quasi Criminal) के अन्तर्गत आता है और यह सुस्थापित सिद्धांत है कि कोई भी फौजदारी निर्णय सिविल न्यायालय के उपर बाध्यकारी नहीं है। ऐसा ही मन्तव्य निर्णयज विधि ए०आई०आर० 2009, उच्चतम न्यायालय, पृष्ठ 2483 सेठ रामदयाल जाट बनाम लक्ष्मी प्रसाद में माननीय उच्चतम न्यायालय द्वारा व्यक्त किया गया है। माननीय उच्चतम न्यायालय द्वारा यह अवधारित किया गया है कि फौजदारी निर्णय सिविल न्यायालय एवं वाद में ग्राह्य नहीं होता है परन्तु यदि कोई स्वीकारोक्ति (Admission) फौजदारी वाद में की गयी है तो उक्त स्वीकारोक्ति सिविल न्यायालय में चल रही कार्यवाही में ग्राह्य होगी। जैसा कि विपक्षी के द्वारा धारा 125, द०प्र०सं० के वाद में अपनी जिरह में एवं प्रतिवादपत्र में वादिया को तलाक दिया जाना स्वीकार किया गया है ऐसी दशा में उक्त स्वीकारोक्ति प्रस्तुत प्रकरण में साक्ष्य में ग्राह्य है। उक्त के अतिरिक्त अन्य कोई निष्कर्ष प्रस्तुत प्रकरण में साक्ष्य में ग्राह्य योग्य नहीं है। इसी स्तर पर यह तथ्य उल्लेखनीय है कि वाद अन्तर्गत धारा 125, द०प्र०सं० में विपक्षी ने स्वयं के द्वारा वादिया को तलाक दिया जाना, उसे विवाह के बंधन से मुक्त किये जाने और आजाद किये जाने का कथन किया गया था। इसके बावजूद भी प्रस्तुत प्रकरण के अन्तर्गत विपक्षी ने यह कहते हुये प्रतिवादपत्र दाखिल किया कि उसने वादिया को तलाक नहीं दिया है जिससे विपक्षी की विद्वेषपूर्ण भावना स्पष्ट हो जाती है कि वह प्रस्तुत प्रकरण में दिये जाने वाले अनुतोष एवं विधिक जिम्मेदारी से बचना चाहता है और अपने फायदे के लिये प्रस्तुत प्रकरण एवं धारा 125 द०प्र०सं० के वाद में भिन्न-भिन्न विरोधाभासी कथन किये हैं। जैसा कि प्रस्तुत प्रकरण अन्तर्गत धारा 3/4 मुस्लिम महिला (तलाक पर अधिकारों का संरक्षण) अधिनियम, 1986 एक सिविल प्रक्रिया है ऐसी दशा में धारा 125, द०प्र०सं० के अन्तर्गत दिये गये निष्कर्ष की कोई सुसंगत एवं बाध्यता इस न्यायालय पर नहीं है। तदनुसार अवधार्य बिन्दु संख्या 03 वादिया के पक्ष में विपक्षी के विरुद्ध नकारात्मक रूप से निर्णीत किया जाता है।

निस्तारण अवधार्य बिन्दु संख्या 04 :-

यह अवधार्य बिन्दु अनुतोष से सम्बन्धित है।

जैसा कि वाद बिन्दु संख्या 01, 02 व 03 का निस्तारण करते हुये न्यायालय द्वारा यह स्पष्ट किया जा चुका है कि विपक्षी ने दिनांक 14-04-07 को वादिया को तलाक दे दिया है और वादिया विपक्षी की तलाकशुदा पत्नी थी। विपक्षी ने तलाक के उपरांत मेहर की धनराशि के रूप में 25,000/- रुपये, इददत की धनराशि के रूप में 16,880/- रुपये की अदायगी नहीं की है और न ही फेयर प्रोवीजन के रूप में किसी भी धनराशि की अदायगी की है और ना ही लिस्ट के अनुसार दहेज के सामान की वापसी की है एवं धारा 125, द०प्र०सं० के अन्तर्गत पारित निर्णय में दिये गये निष्कर्ष प्रस्तुत प्रकरण में सुसंगत एवं ग्राह्य नहीं है। ऐसी दशा में वादिया याचित अनुतोष प्राप्त करने की अधिकारी है। तदनुसार वादिया का वाद सख्य आज़ाप्त किये जाने योग्य है।

आदेश

वादिया का वाद अन्तर्गत धारा 3/4 मुस्लिम महिला (तलाक पर अधिकारों का संरक्षण) अधिनियम, 1986 सख्य आज़ाप्त किया जाता है। विपक्षी को आदेशित किया जाता है कि वह वादिया को मेहर की धनराशि 25,000/-, इददत की धनराशि 16,880/- रुपये की अदायगी करे तथा फेयर प्रोवीजन के रूप में एक लाख रुपये अदा करे तथा पत्रावली में सलग्न लिस्ट के अनुसार सामान की वापसी निर्णय के दिनांक से एक माह के अन्दर करे अथवा उक्त के समर्थ में 2,50,000/- रुपये अदा करे।